(22,163)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 281.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GREENWOOD GROCERY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 3, 1912.

a *Caption.*

In the Supreme Court of Mississippi, October Term, A. D. 1909, Monday, October 11th, 1909.

Pleas and Proceedings Had and Done at a Regular Term of the Supreme Court of Mississippi, Held at the Court Room in the Capitol, in the City of Jackson, Mississippi, on the Second Monday of October, A. D. 1909, in the Case of—

No. 13954.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
GREENWOOD GROCERY COMPANY.

1 STATE OF MISSISSIPPI,
County of Leflore, ss:

YAZOO AND MISSISSIPPI RAILROAD COMPANY
vs.
GREENWOOD GROCERY COMPANY.

Appeal from the Circuit Court of Leflore County, January Term, 1909.

Bill of Exceptions.

Be it remembered at a regular term of the Circuit Court of Leflore County, Mississippi, held at Greenwood, in said County, begin-ing on the third Monday in January, 1909, there being present, his Honor, Judge Sidney Smith, J. B. Humphreys, Clerk of the Circuit Court of said County, H. Levy, Official Stenographer and S. Z. Prophet, Sheriff, when on the — day of January, there came on to be heard, among other causes, the cause of the Yazoo & Mississippi Railroad Company vs. The Greenwood Grocery Company, when, by agreement of the counsel, a jury was waived, and the issue to be tried submitted to the Court.

Thereupon, the following proceedings were had and done, that is to say: the facts in said cause having been agreed upon in writing, the same was submitted with the exhibits, which include the account sued on and the off set, which agreed statement of facts, account and off set were in words and figures as follows: to-wit:

In the Justice Court. D. P. Montgomery, J. P. Beat 3, Leflore Co., Miss.

YAZOO & MISSISSIPPI RAILROAD COMPANY
vs.
GREENWOOD GROCERY COMPANY.

The following statement of facts is agreed on by and between the parties hereto, to-wit:

1.

The Yazoo & Mississippi Railroad Company, plaintiff, is a corporation and common carrier handling interstate railroad shipments into and out of Greenwood, Missisippi, with a switch yard,
2 and side-tracks in Greenwood and a side track running to the warehouse of the Greenwood Grocery Company, which is situated on the right of way and grounds of the Yazoo & Mississippi Valley Railroad Company.

2.

The Greenwood Grocery Company, defendant, is a corporation doing wholesale grocery business at Greenwood with its warehouse located as stated.

3.

Numerous cars containing interstate shipments consigned to the Greenwood Grocery Company at Greenwood, Mississippi, were received at different points on its line by the Yazoo & Mississippi Valley Railroad Company for delivery to the Greenwood Grocery Company at Greenwood and arrived there over the plaintiff's tracks. These cars were placed on the warehouse track of the defendant according to custom to be unloaded and there remained for the time shown by plaintiff's stat-ment of claim filed herein before being unloaded by defendant.

Plaintiff now claims and sues for demurrage for Sixty-seven Dollars ($67.00) which amount, is admitted to be a reasonable charge and is admitted to be correct as shown by the said statement of plaintiff; and that plaintiff is entitled to recover said amount, if the court should refuse to allow set-off claimed by defendant.

IV.

Numerous cars containing interstate shipments consigned to defendant at Greenwood were received by plaintiff at different points on its line of railroad for transportation and delivery to the defendant at Greenwood and arrived there over plaintiff's tracks. Plaintiff then held said cars in its yards at Greenwood for the various times shown by statement of defendant filed herewith, which is admitted to be correct, without delivering them to the defendant. Defendant claims delayage under the rules of the Mississippi Railroad Commission for Fifty-eight Dollars ($58.00), the same being figured on the

basis of $1.00 per day per car, which is admitted to be a reasonable charge and is admitted to be correct as shown by the statement above mentioned and asks that the same be allowed as an off-set against the claim of plaintiff; derendant also tenders Nine Dollars ($9.00) difference in accounts, interest and court costs already ac-
3 crued, which plaintiff refused.

V.

The issue herein submitted is whether or not defendant can offset in this action by plaintiff its claim for delayage on cars containing interstate shipments, received by plaintiff, but delayed in its yards at destination before delivery by plaintiff *by* defendant, as against claim of plaintiff for demurrage charges against defendant which accrued at Greenwood, Mississippi, on cars containing interstate shipments to defendant and after plaintiff had notified defendant of the receipt of said cars and had placed them for unloading at defendant's warehouse, its place of business, according to custom, which cars were delayed in unloading as shown by plaintiff's statement; plaintiff's contention being that the delayage rules of the Mississippi Railroad Commission so far as they apply to delays arising after the arrival of cars in the yards of plaintiff at destination but before delivery at warehouse of defendant, are unconstitutional and void, if the cars contained interstate shipments.

VI.

The copy of the demurrage and delayage rules of the Mississippi Railroad Commission hereto attached is correct and may be considered in evidence on the trial of this cause.

Witness our signature- this the 26th day of May, A. D. 1908.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO.,
By McCLURG, GARDNER & WHITTINGTON,
Attorneys.
THE GREENWOOD GROCERY COMPANY,
By POLLARD & HAMNER, *Attorneys.*

Demurrage and Delayage Rules Fixed by the Mississippi Railroad Commission June 8, 1904.

Effective June 18, 1904.

S. D. McNair, President.
R. L. Bradley, J. C. Kincannon, Commissioners.
T. R. Maxwell, Secretary.

4 Demurrage and Delayage Rules, Adopted June 8, 1904, and Effective June 18, 1904.

Rule 1. Railroad Companies shall within twenty-four hours after the arrival of shipments, give notice by mail or otherwise, to con-

signee of arrival of goods, together with weight and amount of freight charges due thereon and on goods in car load quantities, said notices must contain letters or initials of the car, number of the car, and if transferred in transit, the number and initial of the original car, net weight and the amount of freight charges due on same. No demurrage charge shall be made unless legal notice of arrival is given to consignee.

Any Railroad Company failing to give such notice, and to deliver such freight at its depots or warehouses, or, in case of shipment for track delivery, to place loaded cars at an accessible place for unloading, within twenty-four hours after arrival, computing from 7 A. M., the day following the arrival, shall forfeit and pay the consignee, or other party whose interest is affected, the sum of $1.00 per car per day or fraction of a day, on all carload shipments, and one cent per one hundred (100) pounds per day or fraction thereof, on less than car load lots, with a minimum charge of five cents for any one package, after the expiration of said twenty-four hours.

Rule 2. Legal notice referred to in these rules may be either actual or constructive. Where the consignee is personally served with notice of the arrival of freight, free time begins at 7 o'clock a. m. on the day after such notice has been given. Constructive notice referred to consists of posting notice by mail to the consignee; provided, however, that if, in any case, where notice of arrival is given, by mail, the consignee will make oath that neither he, his agents, or employees have received such notice, then no demurrage charges shall be made until after legal notice as above specified, is given.

Rule 3. For all package freight not unloaded in depot or warehouse by Railroad Company within forty-eight hours, not including Sundays or legal holidays, computing from 7 a. m. on day following arrival, the Railroad Company may be subjected by the consignee to a charge for each day or fraction of a day that said freight remains in a car as follows:

In less than car load quantities, not more than ten cents per ton of two thousand pounds per day.

All package freight unloaded in depot and warehouses, which is not removed by the owners thereof from the custody of the Railroad Company within forty-eight hours (not including Sundays or legal holidays), computed from 7 o'clock a. m. on the day following the day of legal notice of arrival, may be subject thereafter to a charge of storage for each day or fraction of a day, that it may remain in the custody of the Railroad Company, as follows:

In less than car load quantities, not more than one cent per hundred pounds per day.

In car load quantities, not more than (10) cents per ton of two thousand (2000) per day.

When consignee resides more than three miles and within ten miles of the railroad station, five days free time will be allowed.

When consignee resides more than ten miles from the railroad station seven days free time will be allowed.

Rule 4. Loaded cars, which by consent and agreement between the railroad and consignee, that are to be loaded by consignee, such

as bulk meat, bulk grain, hay, cotton seed, lumber, lime, coal, coke, sand, brick, stone and wood, and all cars taking track delivery, which are not unloaded from the cars containing same within forty-eight (48) hours (not including Sundays or legal holidays), computed from 7 o'clock a. m., of the day following the day legal notice of arrival is given, and the car or cars are placed accessible for unloading, may be subject thereafter to a charge of demurrage of one dollar per car for each day, or fraction of a day, that said car or cars remain loaded in the possession of the Railroad Company, it being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which free of demurrage; that when the period of such demurrage charges commence, they are to be placed accessible to the consignee for unloading purposes, on demand of the consignee; provided, however, that if the railroad company shall remove such car or cars after being so placed, or in any way obstruct the unloading of the same, the consignee shall not be chargeable with the delay caused ther-by, provided, further, that when any consignee shall receive four or more cars during any one day loaded with lumber, laths, shingles, wood, coal, coke, lime, ore, sand or bricks, and all cars taking track delivery, the said cars in excess of three shall not be liable to demurrage by any railroad company until after the expiration of seventy-two hours.

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When consignee resides more than three miles and within ten miles of the railroad station, five days free time will be allowed.

When consignee resides more than ten miles from the railroad station seven days free time will be allowed.

Rule 5. When consignee ships goods to order but express in their bills of lading the name of person at destination to notify, it shall be the duty of the railroad company to give legal notice to such party in the same way and under the same rule as if the shipment had been made to him. But when consignors do not comply with this condition, the notices may be addressed by mail to the consignee at point of delivery, and demurrage will begin as in other cases of notice by mail, and the mailing of such notice shall be sufficient legal notice, whether the consignee actually receives the same or not.

Rule 6. Railroad Companies are authorized to store such property in public warehouses at the expense of the owner, if same is not removed before demurrage charges attach, provided, that storage charges on such freight shall not exceed the demurrage allowed under their rules.

Rule 7. Whenever the weather during the *the* period of free time is so severe, inclement or rainy that it is impracticable to secure means of removal, or where, from the nature of the goods, removal would cause injury or damage, such time shall be added to the free period, and no demurrage charges shall be allowed for such additional time.

7

This rule applies to the state of the weather during business hours.

Rule 8. Railroads shall not discriminate between persons or place in storage or demurrage charges. If a railroad company collects storage or demurrage of one person under the demurrage rules, it

must collect of all who are liable. No rebate, drawback or other similar devise will be allowed.

If demurrage is collected by a railroad company at one point on its line it must collect at all of the places on its line, of those liable under the rules of this commission, that the commission shall hear and grant applications to suspend the operation of the rule whenever justice shall demand this course.

Rule 9. Whenever a shipper makes a verbal or written application to a railroad company for car or cars to be loaded with any kind of freight embraced in the tariff of said company stating the articles and destination, the railroad company shall furnish same within five (5) days from seven (7) o'clock a. m. the day following such application or when the shipper making such application specifies a future day on which he desires notice thereof, computing from 7 o'clock a. m., the day following such notice, the railroad company shall furnish such car or cars on the day specified; provided, that if the movement of cars is suspended on account of accident or other causes not within the power of the railroad company to prevent, such period shall be added to the five days' time allowed in this rule.

For failure to comply with this rule the railroad company shall pay to the shipper a delayage charge of $1.00 per car per day, or fraction thereof, after the expiration of free time, upon demand in writing in thirty days (30) *days* thereafter.

Rule 10. Cars detained or held on account of shipper's failure to load, or for want of proper shipping instructions, or by reason of improper loading, when loading is done by shipper, shall be subject to demurrage charges of $1.00 per car per day or fraction thereof, so detained.

8 Shipper must be notified as soon as cars improperly loaded are received from him, in which case demurrage shall begin with notification.

Likewise, when cars are properly loaded, and shipping instructions given, the railroad agent must immediately issue bills of lading therefor; and if said cars are detained or held, and not carried forward within twenty-four (24) hours thereafter, said railroad company shall be liable to said shipper for the payment of $1.00 per car for each day, or fraction of a day that said car or cars are thus detained or held.

Likewise where cars are detained in transit by being switched to some track between point of shipment and destination, one dollar per car will be charged for each day or fraction of a day of delay thus caused, and no free time in such case will be allowed.

Twenty-four hours' free time will be allowed for delay at the end of the freight division on which shipments originate and a like period of twenty-four hours' free time for delivery to connecting lines on joint shipments and a charge of one dollar per car delayage shall be charged for each day or fraction thereof in excess of twenty-hours same is held at such freight division or connecting point.

Rule 11. No other charge shall be made for storage or demurrage except as provided in the foregoing rules, and if a railroad company

is indebted to a shipper or consignee for delayage, then a claim for demurrage shall be offset by a claim for delayage.

Rule 12. These rules apply only to places where Car Service Rules are in operation.

Rule 13. When both cars and track are owned by the same party, no charge for demurrage will be made. When private cars are detained on the tracks of other firms or individuals, or on the tracks belonging to or operated by members of this association, or cars belonging to the latter upon private tracks, the established charge will apply.

Rule 14. At junction points where consignee's track is located on one road, and cars are received by a connecting road, it shall be the duty of the said connecting road to switch and deliver such cars to the road on which consignee's sidetrack is located within
9 twenty-four hours from 7 o'clock a. m. after the time of the arrival; and of the road on which consignee's side track is located to switch and place such cars on said side track within twenty-four hours from 7 a. m. after the time of delivery by the receiving road.

Failure in this regard shall subject either road to delayage charge of one dollar per car per day or fraction thereof, provided, this shall not prevent the charge and collection of established or reasonable switching charges by the road on which said side track is located, and provided, further, that if said side track, without fault of the railroad, is blocked so that delivery cannot be made, the time it remains blocked shall be added to the free time specified herein.

Rule 15. In all computation of time under the rules Sundays and legal holidays are to be excluded.

S. D. McNAIR, *President;*
R. L. BRADLEY,
J. C. KINCANNON,
Commissioners.

Attest:

T. R. MAXWELL, *Sec'y.*

Greenwood, Miss., *June 5th*, 1907.

The Greenwood Grocery Company to The Yazoo & Mississippi Valley Railroad Company, Dr.

To demurrage charges on I. C. Car No. 12173 from Jan. 13, 1904 to Jan. 17 inclusive, 1 day at $1. per day.....	$1.00
To demurrage charges on L. & N. Car No. 11434 from Dec. 12, 1904 to Dec. 16, 1904, inclusive at $1. per day.....	2.00
To demurrage on I. C. Car No. 17165 from Dec. 12, 1904 to Dec. 16, 1904 inclusive at $1.00 per day.....	2.00
To demurrage on I. C. Car No. 10241 Dec. 14, 1904 to Dec. 17, 1904 one day at $1.00 per day.....	1.00
To demurrage charges on I. C. Car No. 37063, Dec. 14, 1904 to Dec. 17, 1904, one day at $1.00 per day.....	1.00
10 To demurrage charges on C. B. 2 No. 53110, Dec. 15, 1904 to Dec. 19th 1 day at $1.00 per day.....	1.00

To demurrage charges on I. C. car No. 55066, Dec. 5, 1904 to Dec. 9, 1904, 2 days at $1.00 per day	2.00
To demurrage charges on S. W. No. 21890 Dec. 16, 1904 to Dec. 20, 1904, 1 day at $1.00 per day	1.00
To demurrage charges on S. P. No. 19803 Feb. 20 1905 to Feb. 23, 1905, 1 day at $1.00 per day	1.00
To demurrage charges on I. C. No. 1346 Dec. 15, to Dec. 19, 1904, 1 day at 1.00 per day	1.00
To demurrage charges on A. R. T. No. 5159 July 25th to 29th 1905 1 day at $1.00 per day	1.00
To demurrage charges on I. C. No. 45675 May 2, to May 5, 1905 1 day at $1.00 per day	1.00
To demurrage charges on Mo. P. No. 26186 April 4 to 7 1904 1 day at $1.00 per day	1.00
To demurrage charges on 3 C. C. C. St. T. B. No. 13676 March 17 to 21 1904 1 day at $1.00 per day	1.00
To demurrage charge on Sou. R. R. No. 12134 Feb. 21 to 25, 1904 1 day at 1.00 per day	1.00
To demurrage charges on Big 4 No. 7074 Feb. 20, to 25 1904 2 days at *L*.00 per day	2.00
To demurrage charges on S. R. L. No. 548 Nov. 6 to 17 1905 8 days at $*L*.00 per day	8.00
To demurrage charge on I. C. No. 26468 May 16 to 22 1906 1 day at 1.00 per day	1.00
To demurrage charges on L. & N. No. 15128 June 3 to June 8 1906, 2 days at $1.00 per day	2.00
To demurrage charges on C. R. I. & P. M'ch 19 1906 to March 24 1906 3 dats at $1.00 per day	3.00
To demurrage charges on I. C. No. 54138 Feb. 23 to March 3rd 1906, 5 days at $1.00 per day	5.00
To demurrage charges on I. C. No. 35099 M'ch 5, to March 13, 1906, 2 days at $1.00 per day	2.00
11 To demurrage charges on I. C. No. 10038, M'ch 5 to M'ch 13, 1906, 2 days at $1.00 per day	2.00
To demurrage charges on I. C. No. 22698 M'ch 12 to M'ch 22, 1906, 5 days at $1.00 per day	5.00
To demurrage charges on I. C. No. 11478, M'ch 8, to M'ch 24, 1906 7 days at $1.00 per day	7.00
To demurrage charges on I. C. No. 14021 M'ch 19 to 22, 1906 7 days at $1.00 per day	7.00
	$67.00

In the Justice Court, D. P. Montgomery, Justice of the Peace, Beat 3, Leflore Co., Miss.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
GREENWOOD GROCERY COMPANY.

Now comes the defendant, Greenwood Grocery Company, by Pollard & Hamner its attorneys, and files the account hereto attached marked "Exhibit A" as a part of this plea and ask that the same be allowed as set-off against the statement filed by plaintiff herein and tender to plaintiff the sum of $9.00 being the difference between the amount sued for and the amount of this set-off and $— and costs accrued, defendant will ask to be discharged with costs.

POLLARD & HAMNER,
Attorneys for Defendant.

12 "EXHIBIT A."

Greenwood Grocery Company, Wholesale Grocers.

GREENWOOD, MISS., *March 5th*, 1908.

Sold to Alabama Car Service Assn., Y. & M. V. Ry.

Delayage to car	C. B. & Q.	28090	8 days at	1.00.....	8.00
	C. G. & W.	50152	9 "	" 1.00.....	9.00
	I. C.	4963	4 "	" 1.00.....	4.00
	S. R. L.	184	3 "	" 1.00.....	3.00
	I. C.	9667	8 "	" 1.00.....	8.00
	M. Pac.	25391	8 "	" 1.00.....	8.00
	M. & O.	17838	2 "	" 1.00.....	2.00
	I. C.	11445	1 "	" 1.00.....	1.00
	I. C.	37171	6 "	" 1.00.....	6.00
	I. C.	55851	1 "	" 1.00.....	1.00
	I. C.	23473	2 "	" 1.00.....	2.00
	I. C.	46117	5 "	" 1.00.....	5.00
	I. C.	16898	1 "	" 1.00.....	1.00
					$58.00

Greenwood Grocery Company, Wholesale Grocers.

GREENWOOD, MISS., 11, 9, '07.

Sold to Alabama Car Service Association, Y. & M. V. Ry.

Delay in placing Car Flour I. C. 37171; car arrived Greenwood October 19th, 1907.
Car placed Oct. 28th, 1907.

Delay... 9 days.

Less free time 1 day.
10/20 Sunday 1 day.
10/27 " 1 day.

3 days' free time.

6 days at $1.00..... $6.00

13 Greenwood Grocery Company, Wholesale Grocers.

GREENWOOD, MISS., 11, 9, '07.

Sold to Alabama Car Service Association, Y. & M. V. Ry.

Delay in placing car meat, I. C. 55351; car arrived Greenwood October 12th, 1907.
Car placed Oct. 15th, 1907.

Delay... 3 days.

Less free time 1 day.
Less Sunday 10/13 1 day. 2 days' free time.

Delay 1 day at $1.00..... $1.00

Greenwood Grocery Company, Wholesale Grocers.

GREENWOOD, MISS., 11, 9, '07.

Sold to Alabama Car Service Association, Y. & M. V. Ry.

Delay in placing car Sugar, I. C. 23473; car arrived Greenwood October 12th, 1907.
Car placed October 14th, 1907.

Delay..... 4 days.

Less free time one day.
10/13 Sunday, one day. 2 days' free time.

Delay—2 days at $1.00..... $2.00

Greenwood Grocery Company, Wholesale Grocers.

GREENWOOD, MISS., 11, 9, '07.

Sold to Alabama Car Service Association, Y. & M. V. Ry.

Delay in placing car sugar I. C. 46117; car arrived at Greenwood Oct. 22nd, 1907.
Car placed Oct. 29th, 1907.

Delay.... 7 days.

Less free time 1 day.
10/27 Sunday 1 day. 2 days' free time.

Delay—5 days at $1.00..... $5.00

14 Greenwood Grocery Company, Wholesale Grocers.

GREENWOOD, MISS., 11, 9, '07.

Sold to Alabama Car Service Association, Y. & M. V. Ry.

Delay in placing car lard, Sou. 16898; car arrived Greenwood Oct. 19th, 1907.
Car placed Oct. 22nd, 1907.

Delay.... 3 days.

Less free time 1 day.
10/20 Sunday 1 day. L. 2 days' free time.

Delay—1 day at $1.00..... $1.00

Greenwood Grocery Company, Wholesale Grocers.

GREENWOOD, MISS., 2, 20, '07.

Sold to Alabama Car Service Association, Y. & M. V. Ry.

Delay to M. & O. 17838, merchandise for Europa, Miss.
Switch order & B/L signed 7 a. m. Dec. 11th, Free Time.

December 12th $1.00
Placed on transfer Dec. 13th 12 p. m..... 1.00

Delay 2 days..... $2.00

Greenwood Grocery Company, Wholesale Grocers.

GREENWOOD, MISS., 2, 20, '07.

Sold to Alabama Car Service Association, Y. & M. V. Ry.

Delay to I. C. 11445, merchandise South Local.
B/L Signed Dec. 13th, 5 p. m.
Dec. 14th, Free time

Car pulled from house 3 p. m. Dec. 15th..... $1.00

Delay 1 day $1.00

15 Greenwood Grocery Company, Wholesale Grocers.

GREENWOOD, MISS., 12, 11, 1905.

Sold to Y. & M. V. R. R. Co., City.

Delayage to C. B. & Q. 28090.
Loaded with rice. Noticed signed and freight paid Nov. 25th, 1905.

Nov. 25.	Placed free time	1—		
Nov. 26.	Sunday " "	1—		
Nov. 27.	Pushed below house	1—	1.00	1.00
Nov. 28.	" " "	1—	1.00	1.00
Nov. 29.	" " "	Off track	1.00	1.00
Nov. 30.	Free time.			
Dec. 1.	Pushed below house off track		1.00	1.00
2.	" " " " "		1.00	1.00
3.	" " " " "		1.00	1.00
4.	" " " " "		1.00	1.00
5.	" " " " "		1.00	1.00
				8.00

Greenwood Grocery Company, Wholesale Grocers.

GREENWOOD, MISS., 12, 11, 1905.

Sold to Y. & M. V. R. R. Co., City.

Delayage to C. G. W. 50152.
Loaded with salt. Notice signed for and freight paid Nov. 25th, 1905.

Nov. 25.	Not placed.	Free time.		
Nov. 26.	Not placed.	Sunday Free Time.		
Nov. 27.	Not placed		1.00	1.00
Nov. 28.	Not placed			1.00
Nov. 29.	Not placed			1.00
Nov. 30.	Not placed			1.00
Dec. 1.	Not placed			1.00
Dec. 2.	Not placed			1.00
Dec. 3.	Not placed.	Sunday Free Time.		
Dec. 4.	Not placed			1.00
Dec. 5.	Not placed			1.00
Dec. 6.	Not placed			1.00
				9.00

16 Greenwood Grocery Company, Wholesale Grocers.

GREENWOOD, MISS., 12, 30, 1905.

Sold to Y. & M. V. R. R. Co., City.

I. C. 4963 loaded with soda.

1905.
Dec. 23. Arrived at Greenwood.
Dec. 24. Sunday.
Dec. 25. Christmas Day.
Dec. 26. Not placed 1.00
Dec. 27. " " 1.00
Dec. 28. " " 1.00
Dec. 29. " " 1.00
Dec. 30. " " 1.00

4.00

Greenwood Grocery Company, Wholesale Grocers.

GREENWOOD, MISS., *Dec. 22nd*, 1905.

S. R. L. 184 loaded with meat and lard.

Dec. 18th. Notice Book Signed.
Dec. 19th. Not placed for unloading.
Dec. 20th. " " " " 1.00
Dec. 21st. " " " " 1.00
Dec. 22nd. " " " " 1.00

$3.00

Car placed 11 P. M. Dec. 22nd.

17 The Goyer Produce Company, Wholesale Grocers.

GREENWOOD, MISS., 4, —, 1906.

Sold to Southern R. R. Co., City.

Delay to Flour Loaded in Mo. Pac. 25391.

April 6. B/L signed at Princeton, Ind.
7. En route.
8. Sunday.
9. En route.
10. En route.
11. "
12. "
13. "
14. "

15. Sunday.
16. En route B/L surrendered.
17. Arrived at Greenwood.
18. Ordered placed (transfer).
19. Not switched 1.00
20. " " 1.00
21. " " 1.00
22. Sunday.
23. Not switched 1.00
24. " " 1.00
25. Placed on transfer 1.00
26. Not placed at warehouse..... 1.00
27. " " " " 1.00

8.00

STATE OF MISSISSIPPI,
Leflore County:

Personally appeared before me the undersigned authority in and for said county and state, E. M. Purcell, secretary and treasurer of the Greenwood Grocery Company, a corporation, who being first duly sworn says on oath that the foregoing statement of account against Yazoo & Mississippi Railroad Company for delayage is correct, true, owing, and unpaid as shown by said statement and that no allowance has been received from the said Yazoo & Mississippi Railroad Company by the said Greenwood Grocery Company for said delayage.

——— ———.

Sworn to and subscribed before me, this the — day of March, 1908.

——— ———.

And after argument of counsel, the court allowed the off-set sued on by defendant, when the following judgment was rendered:

18 *Minutes of the Circuit Court of Leflore County, Miss., January Term, 1909, January 26th, 1909.*

No. 4195.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
GREENWOOD GROCERY COMPANY.

This day this cause came on to be heard and by agreement of all parties, the cause was tried before the Court on agreed state of facts, and the court having considered the said agreed state of facts, and heard the argument of counsel, orders that the offset filed by defendant be and is hereby allowed.

It is further ordered and adjudged that plaintiff do have and

recover of and from defendant the sum of nine dollars, the remainder after allowing the defendant its offset.

It appearing that the difference between the offset filed in this cause by defendant and the amount sued for by plaintiff to-wit: The sum of nine dollars was tendered before the begin-ing of this suit and is still tendered; it is therefore further ordered that the plaintiff be taxed with all costs, etc., to which action of the Court in allowing said set-off by defendant plaintiff excepts.

to which action of the court in allowing said setoff of defendant, plaintiff then and there excepted.

Wherefore, plaintiff tenders this, its bill of exceptions, and prays that the same may be signed and sealed by the Judge of this Court and made a part of the record of the same, pursuant to the statutes in such cases made and provided; which is accordingly done this, the 2nd day of February, 1909.

SYDNEY SMITH, *Judge.*

O. K.
POLLARD & HAMNER,
Att'ys for Defendant.

Filed March 5th, 1909.
J. B. HUMPHRIES, *Clerk.*

19 *Judgment in Justice's Court.*

This cause having been continued from time to time by consent of the plaintiff and defendant this day came on for hearing and the court having heard all the evidence of plaintiff and defendant and the argument of counsel for both parties, doth order adjudge and decree that the plaintiff, the Yazoo & Mississippi Valley Railroad Company do have and recover of and from the defendant the Greenwood Grocery Company the sum of $9.00 and costs to this date for which let execution issue.

Thus ordered adjudged and decreed.

This 18th day of June, A. D. 1908.

D. P. MONTGOMERY,
Justice of the Peace.

Suit tried on an agreed state of facts in writing filed on the 18th day of June, 1908.

D. P. MONTGOMERY, *J. P.*

Fee Bill.

Costs of J. P.:

Proceeding to Judgment	.50
Entering Suit	.25
Entering Judgment	.20
Appeal & Bond	1.00
2 affidavits	.50
Certificate	.25
	$2.90

Sheriff's Costs:

E. & R. Summons	.50	
Executing Summons	1.00	
		2.00
Total Costs		$4.90

20 Know all men by these presents, that the Yazoo & Mississippi Valley Railroad Company, a corporation, principal, and A. F. Gardner and W. M. Whittington, sureties, are held and bound unto the Greenwood Grocery Company, a corporation, in the sum of Two hundred Dollars, for the payment of which we bind ourselves and representatives, this the 22nd day of June, A. D. 1908.

The condition of the foregoing obligation is such that, whereas, judgment was rendered in favor of the defendant in the suit of the Yazoo & Mississippi Valley Railroad Company vs. Greenwood Grocery Company in the Justice Court of Beat Three of Leflore County, Mississippi, on the 19th day of June, 1908, and whereas, the said Yazoo & Mississippi Railroad Company feels aggrieved by the rendition of said judgment in favor of said defendant, and having prayed and obtained an appeal to the next term of the Circuit Court of Leflore County, Mississippi, now, should the said Yazoo & Mississippi Valley Railroad Company satisfy and discharge such judgment as may be rendered against it in said Circuit Court, then this obligation to be void, but, if otherwise, to remain in full force and effect.

YAZOO & MISSISSIPPI VALLEY R. R. CO.
GARDNER & WHITTINGTON,
Attorneys.

A. F. GARDNER.
W. M. WHITTINGTON.

I approve the above bond this, the 22nd day of June, 1908.
D. P. MONTGOMERY, *J. P.*

STATE OF MISSISSIPPI,
Leflore County:

I, D. P. Montgomery, a Justice of the Peace of said County, certify that the foregoing is a copy of the record of the proceedings before me, in the case stated therein, as appear on my docket.

Given under my hand, this the 23rd day of June, A. D. 1908.
D. P. MONTGOMERY,
Justice of the Peace.

Filed the 23rd day of June, A. D. 1908.
J. B. HUMPHRIES, *Clerk.*

21 To J. B. Humphries, Clerk of the Circuit Court, Leflore County:

The undersigned Y. & M. V. R. R. Co. feels aggrieved by a judgment at the January Term, 1909, of the Circuit Court for the said

County and State of Mississippi, in a certain cause, wherein the Y. & M. V. R. R. Co. was plaintiff and the Greenwood Grocery Company was defendant.

Wherefore it prays that an appeal to operate as a Supercedeas may issue, returnable to the next term of the Supreme Court of said State, to be held on the first Monday of April, A. D. 1909, at the Capitol, in the City of Jackson, upon his giving bond as required by law.

THE YAZOO & MISSISSIPPI VALLEY
RAILROAD COMPANY,
By GARDNER & WHITTINGTON,
Attorneys.

Filed the 3rd day of March, 1909.
J. B. HUMPHRIES, *Clerk.*

22 *Appeal Bond.*

STATE OF MISSISSIPPI,
County of Leflore:

We, the Yazoo & Mississippi Railroad Company, a corporation, principal, and W. M. Whittington and A. F. Gardner sureties, are held and firmly bound unto the Greenwood Grocery Company in the sum of Five Hundred Dollars, for the payment of which, we bind ourselves, our heirs and representatives this, the 3rd day of March, 1909.

The condition of the above obligation is such that, whereas judgment was rendered against the said Yazoo & Mississippi Valley Railroad Company, in the suit of the Yazoo & Mississippi Railroad Company vs. the Greenwood Grocery Company, in the Circuit Court of Leflore County, Mississippi at the January Term, 1909, and whereas, the said Yazoo & Mississippi Valley Railroad Company feels aggrieved by the rendition of said judgment against it, in said Circuit Court, and having prayed for and obtained an appeal to the next term of the Supreme Court of this state, to be held in the City of Jackson, for the Northern District thereof, begin-ing the first Monday in April, 1909:

Now, should the said Yazoo & Mississippi Valley Railroad Company satisfy and discharge such judgment as may be rendered against it by the said Supreme Court, then this obligation to be void, but otherwise, to remain in full force and effect.

YAZOO & MISSISSIPPI VALLEY
RAILROAD COMPANY
By GARDNER & WHITTINGTON,
Attorneys.
W. M. WHITTINGTON.
A. F. GARDNER.

The above bond approved this, the 3rd day of March, 1909.
J. B. HUMPHRIES,
Clerk of Circuit Court.

STATE OF MISSISSIPPI,
Leflore County:

To the Sheriff of said County, Greeting:

Whereas on the 26th day of January A. D. 1909, by judgment of our Circuit Court of Leflore County, in the aforesaid State, Greenwood Grocery Co. a corporation, defendant, recovered judgment against the Yazoo & Mississippi Valley Railroad Co. a corporation, plaintiff, for the sum of nine dollars besides costs of suit; and the said Yazoo & Mississippi Valley Railroad Company having prayed and obtained an appeal, returnable unto our Supreme Court at Jackson, on the first Monday — April next, and having given bond for supersedeas:

We therefore command you to cite the said Greenwood Grocery Co. a corporation, or Pollard & Hamner, attorneys of record, to appear then and there in and before said Supreme Court, to defend the said appeal, and have then there this writ before our said Supreme Court.

Given under my hand and official seal this 13th day of March 1909.

J. B. HUMPHREYS, *Clerk.*

I have executed the within writ by delivering a true copy of same to W. M. Hamner, a member of the firm of Pollard & Hamner attorneys of record in this case. This the 3rd day of March 1909.

S. Z. PROPHET, *Sheriff.*

STATE OF MISSISSIPPI,
Leflore County:

I, J. B. Humphreys, Clerk of the Circuit Court in and for said County, do hereby certify that the foregoing pages contain a true and perfect copy of the record in the above styled cause, as the same appears of record on file in my office.

Given under my hand and official seal, this the 12th day of March A. D. 1909.

[SEAL.]

J. B. HUMPHREYS, *Clerk,*
By J. B. BEW, *D. C.*

Assignment of Errors.

STATE OF MISSISSIPPI,
County of Hinds:

In the Supreme Court, at the March Term, 1909, Third District.

No. 13954.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Appellant,

vs.

GREENWOOD GROCERY COMPANY.

Comes the appellant by its attorneys, and moves the Court to set aside the judgment of the Circuit Court, and assigns the following errors:

1. The judgment rendered in this cause by the Court below was contrary to the law.

Wherefore the appellant prays that the judgment of the lower Court be reversed and the cause remanded.

Respectfully submitted,

MAYES & LONGSTREET,
Attorneys for Appellant.

We hereby certify that we have this, March 31, 1909, mailed copy of the foregoing assignment of error, postage prepaid, to Messrs. Pollard & Hamner, Greenwood, Mississippi, Attorneys for Appellee.

MAYES & LONGSTREET.

25 *Judgment Supreme Court.*

October Term, 1909, Monday, February 28th, 1910.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
GREENWOOD GROCERY COMPANY.

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Leflore County, and the Court having sufficiently examined and considered the same and being of opinion that there is no error therein doth order and adjudge that the judgment of the said Circuit Court rendered in this cause at the January Term, 1909 on the 26th day of January, 1909 be and the same is hereby affirmed, and that appellant and W. M. Whittington and A. F. Gardner sureties in the supersedeus bond do pay the cost of this cause in this court and in the court below to be taxed &c.

26 *Opinion of the Supreme Court of Miss.*

No. 13954.

Y. & M. V. RAILROAD COMPANY
vs.
GREENWOOD GROCERY COMPANY.

MAYES, *J.:*

This suit was begun in a justice court of Leflore County by appellants, and the purpose of the suit is to recover from the Greenwood Grocery Company the sum of sixty-seven dollars, claimed by appellants to be due them by appellee as demurrage on certain cars containing interstate shipments of goods to appellee. The Greenwood Grocery Company undertook to offset this claim with a counter claim of fifty-eight dollars, claimed by it to be due them by appellants as reciprocal demurrage charges. The case was tried in the

justice court and appealed to the circuit court and tried on an agreed record. In the agreed record the facts are stated as concisely as it is possible for them to be stated, and we shall therefore only touch upon the leading features of the case in so far as the facts are concerned.

It is agreed that the cars about which the Greenwood Grocery Company claims the right of reciprocal demurrage contained interstate shipments. The real issue in the case is whether or not the Greenwood Grocery Company can offset its claim for reciprocal demurrage against the claim of plaintiff for demurrage charges against it. It is asserted by appellant that this cannot be done, for the reason that the cars contained interstate shipments, and to allow this offset would be in violation of the federal laws.

The reciprocal demurrage claim of the Greenwood Grocery Company grows out of delays on the part of appellant, occurring in the yards of appellant, and after the interstate shipment reached its destination. No question of the unreasonableness of the delayage charges is involved in this case in any way. As counsel for appellant put it in their brief: "The sole question in the case is whether it is competent for the state Railroad Commission to promulgate a reciprocal demurrage, or delayage rule, which would impose upon the railroad company a charge for delay in the delivery of an
27 interstate shipment. It is a question of the power of the railroad commission to act in the premises." The trial in the court below resulted in a judgment in favor of the Greenwood Grocery Company, thereby sustaining the power of the commission to impose these delayage charges on interstate shipments, and from this judgment an appeal is prosecuted here.

We may say in the outset that the right and power of the state railroad commission to establish these delayage charges, in so far as intra-state shipments are concerned, was upheld in the case of Y. & M. V. Railroad Company v. Keystone Lumber Co., 90 Miss., 391. In the above case there was no question of interstate commerce involved. We may further state that we do not deem it necessary to a decision in this case to determine when a shipment of goods looses its character as interstate commerce. The appellants deny the power of the state railroad commission to promulgate any reciprocal demurrage rule which imposes a charge for delay on appellant, when the charge is sought to be applied to any interstate shipment. The first case which counsel for appellant cite as sustaining this contention is the case of McNeil v. So. Ry. Co., 202 U. S. 543. This case does not seem to us to sustain the contention. Let us see what the facts of the McNeil case were. The Greensboro Ice & Coal Company had a coal and wood yard located some distance from the main track and right of way of the Southern Railroad Company. From this main track there was a private spur track leading over the land of private persons to the Ice and Coal Company's place of business. It seems that the railroad had delivered the freight of the Ice and Coal Company at its place of business by hauling it over this spur at one time, but a dispute having arisen between the railroad company and the Ice and Coal Company concerning demurrage on thirteen cars

of coal and wood, the railroad notified it that thereafter it would only deliver its cars on the public track of the railroad known as the "team" track, on which track all deliveries were made to the public generally. Subsequently, the Ice and Coal Company ordered other coal and wood for interstate shipment over the line of the
28 railroad, and when it arrived the railroad company placed it on the track and notified the Ice and Coal Company. The Coal Company declined to receive the cars elsewhere than on the spur track, and the railroad company declined to deliver same there. A complaint was filed by the Coal Company with the corporations commissions, and that commission ordered the railroad company to make delivery beyond its right of way and on the private siding. On the above facts, the court held that the order of the commission was void because it required carriers engaged in interstate commerce to deliver cars containing such commerce beyond their right of way and to a private siding, thus manifestly imposing a burden so direct and onerous as to leave no doubt that it was a regulation of interstate commerce. But in this very case the Supreme Court of the United States says that it does not draw in question the right of a state, in the exercise of its police authority, to confer on administrative agency the power to make any reasonable regulations concerning the place, manner, and time of delivery of merchandise moving in the channels of interstate commerce.

There is a marked distinction between the McNeil case, above quoted from and cited, and the case now being reviewed by the court. In the McNeil case it was sought to compel the railroad company to haul the goods beyond the line of the company and beyond their proper destination, that is to say, carry them over a private siding to the place of business of the consignee. But in the case under review there is no such attempt. The rule simply operates to compel a reasonably quick delivery to the consignee, on the main line of the railway and amounts to nothing more than a regulation as to the time of delivery, the reasonableness of which is not questioned. It is simply claimed by appellant that whether reasonable or unreasonable, the railroad commission has no power to make this regulation as to interstate shipments. When the whole of the regulation is simply addressed to compelling prompt delivery of the goods, thus enabling the cars to be placed in service for other shippers more speedily, what burden can it be said that such a
29 regulation imposes on commerce? It does not seem to us that the case of McNeil v. Southern Railroad Company, cited above, can be said to be any authority for appellant, but it is more an authority for appellee when the facts are analyzed. The next case mainly relied upon by appellants' counsel is the case of Houston R. R. Co. v. Mayes, 201 U. S. 321. An analysis of this case in the light of its facts easily distinguishes it from the case on trial. The case last cited involved the constitutionality of a Texas statute which provided that whenever a shipper should make requisition, in writing, for a number of cars to be furnished at any point indicated within a certain number of days from the receipt of the application, and should deposit one-fourth of the freight with the agent of the

company, the company failing to furnish the cars should forfeit twenty-five dollars per day for each car failed to be furnished, the only proviso being that the law should not apply in case of strikes or other public calamity. The court held the statute void as applied to interstate commerce, but also said that the statute was not far from the line of proper police regulation. We do not think any principle announced by the Mayes case, cited above, is controlling here, or that the contention of appellees in any way conflicts with the principles announced in either of the cases already cited. Several other cases are cited by counsel for appellants, but it is our judgment that these cases cannot be relied on as authority by appellants. The cases to which we allude are,

Rhodes v. Iowa, 170 U. S., 412;
U. S. v. Railway, 149 Fed., 481;
State v. Adams Express Co., 55 N. E., 337;
Adams Express Co. v. Kentucky, 214 U. S., 218.

Much of the difficulty in this case is dissolved when we keep in mind the fact that the whole of the duty of a railroad company is not discharged in an interstate shipment merely by the transportation of the goods to point of destination. The railroad company owes the further duty, under the general law of the land, to deliver the goods to the consignee. In order to do this, it is bound to so place the goods as that the consignee may get possession of them, else it fails in its duty and the goods can be of no use to the owner of same. This being so, the order of the railroad commission fixing delayage charges is merely an order enforcing a general duty that rests upon the carrier and is in aid of, and not an obstruction to commerce. Such an order imposes no additional burden on the carrier. The burden is already there as a common duty. It is a part of the contract of carriage, and the consideration paid by the shipper for the transportation of the goods is paid in part for the fulfillment of this very duty. The grocer can make no use of his goods until he can unload them from the cars; the cars cannot be further used for transportation until they are unloaded; the cars cannot be unloaded until they are so placed as that they may be reached for this purpose, and it is the duty of the carrier to arrange for all these things, whether the shipment be intra or interstate, failing in which the very purpose of transportation itself fails. In view of these facts, how can it be held that a regulation which merely compels a performance of an already existing burden, can be said to impose any additional burden on commerce?

In the case of Charles v. Atlantic Coast Line, 58 S. E., 927, it appears that South Carolina had a statute imposing a penalty of fifty dollars on every common carrier that failed to adjust any claim for loss or damage to freight while in its possession within a certain period therein named. It was argued that this statute was void as to interstate shipments, but the court said:

"The duty to make prompt settlement for loss or damage to goods is but an incident of the duty to transport and deliver safely and with reasonable diligence. The statute in question was designed to effectuate an important public purpose, viz., to compel the com-

mon carrier to perform with reasonable diligence the duty which peculiarly appertains to his business as a carrier of freight.
31 The penalty is but a means to that end.'

"While it is not easy to define the exact limits of the operation of state laws as affecting interstate commerce, we have no hesitation in saying that the statute in question, as it affects carriers doing business in this state who fail or refuse to adjust and pay the loss of or damage to goods while in their possession, is no unlawful interference with interstate commerce, even as applied to an interstate shipment. The penalty imposed is for a delict of duty appertaining to the business of a common carrier, and, in so far as it may affect interstate commerce, it is an aid thereto by its tendency to promote safe and prompt delivery of goods, or its legal equivalent—prompt settlement of proper claim for damages."

In the case of Harrill v. Railway Co., 144 N. C., 532, it seems that a statute of North Carolina provided a penalty on any common carrier for failure to deliver goods to consignee on arrival. It was contended that the statute could have no application to interstate traffic, but the court held that the statute merely enforced a common law duty which was in aid of, rather than an obstruction to interstate commerce and was valid. In the case of Telegraph Co. v. James, 162 U. S. 650, the United States Supreme Court held that an act of the legislature which merely imposed a penalty on a Telegraph Company for the violation of a duty which it owed by the general law of the land, was no regulation of, or obstruction to interstate commerce within the meaning of the Federal Constitution. See also the cases of,

Seaboard Air Line v. Seegers, 52 Law Edition, U. S. R., 108;
State v. Adams Exp. Co., 19 L. R. A. 93 and note;
Morris v. Express Co., 15 L. R. A., 983;
Bagg v. Railroad Co., 109 N. C., 279;
Porter v. Charleston & S. R. Co., 90 Am. St. 671.

We have given to this case the most careful and protracted examination, and it is our view that the rule of the state railroad commission fixing reciprocal delayage rules is perfectly within their
32 power. It imposes no additional duty on the carrier but merely compels the fulfilment of a duty that is an incident to the contract of carriage. It is in aid of commerce rather than an obstruction to it, and operates after the transportation is completed.

Affirmed.

33 UNITED STATES OF AMERICA,
State of Mississippi:

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
v.
THE GREENWOOD GROCERY COMPANY.

Petition for Writ of Error.

To the Honorable Albert H. Whitfield, Chief Justice of the Supreme Court of the State of Mississippi:

The petition of the Yazoo & Mississippi Valley Railroad Company, and of W. M. Whittington and of A. F. Gardner, respectfully shows that on the 28th day of February, 1910, the said Supreme Court rendered judgment against the petitioner in a certain cause wherein your petitioner, the Yazoo & Mississippi Valley Railroad Company, was the appellant, and the other petitioners were its sureties on its appeal bond, and the Greenwood Grocery Company was appellee, affirming a judgment of the trial court, which judgment was in effect adverse to the petitioner railroad company, and for costs, and in legal effect awarded execution thereon, as will appear by reference to the record and proceedings in said cause; that in said suit was drawn in question the validity of certain statutes of the State of Mississippi, on the ground of their being repugnant to the Constitution of the United States, and the Amendments thereto, and the decision of the Supreme Court was in favor of the validity of such statute; and that in said suit was drawn in question the validity of an authority exercised by the Railroad Commission of said State, acting under the statutes of the Constitution of said State, on the ground that such authority so exercised is repugnant to the Constitution of the United States, and the Amendments thereto, and the decision of said Supreme Court was in favor of the validity of such authority; and that in said suit petitioners who were appellants claimed the privilege and immunity under the Constitution
34 and statutes of the United States, and under the Fourteenth Amendment to the said Constitution, and the decision of said Supreme Court was against the said privilege and immunity which was set up and claimed specially under such Constitution and statutes, and under said Fourteenth Amendment.

And the decision of the said Supreme Court of the State of Mississippi was final, and the said Supreme Court is the Court of the highest resort in said State.

Wherefore your petitioners are *agreed*, and they pray for a Writ of Error, with citation and supersedeas, returnable into the Supreme Court of the United States.

And as in duty bound, they will ever pray.

THE YAZOO & MISSISSIPPI VALLEY
RAILROAD COMPANY,
W. M. WHITTINGTON,
A. F. GARDINER,
By MAYES & LONGSTREET, *Attorneys.*

STATE OF MISSISSIPPI:

Desiring to give petitioner an opportunity to test in the Supreme Court of the United States the questions presented in the foregoing petition, and in the Assignment of Errors by which it is accompanied, it is ordered that a Writ of Error be, and the same is hereby, allowed to the said Court, and that the same be made a supersedeas, the bond, in the penal sum of One Thousand Dollars, also herewith presented, being hereby approved.

In testimony whereof, witness my hand, this the 29 day of March, 1910.

A. H. WHITFIELD,
Chief J. Sup. Ct.

[Endorsed:] The Yazoo & Mississippi Valley Railroad Company vs. The Greenwood Grocery Co. Petition for Writ of Error, & Fiat. Filed M'ch 30/10. Geo. C. Myers, Clerk.

35 *Writ of Error Bond.*

Know all men by these presents, That the Yazoo & Mississippi Valley Railroad Company, W. M. Whittington and A. F. Gardner, as principals, and Edward Mayes and J. C. Longstreet, as sureties, are held and firmly bound unto the Greenwood Grocery Company in the sum of One Thousand Dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, our successors, executors, and administrators, jointly and severally, by these presents.

Witness our signatures, this the 29th day of March, A. D. 1910.

The condition of the foregoing obligation is such that, whereas, lately, at the Supreme Court of the State of Mississippi, in a suit pending in said Court between the Yazoo & Mississippi Valley Railroad Company, Appellant, and the Greenwood Grocery Company appellee, a judgment was recovered against the said Greenwood Grocery Company in and for the sum of Nine Dollars, in and by which judgment an offset claimed by the said Greenwood Grocery Company against the original demand as propounded by the Yazoo & Mississippi Valley Railroad Company was allowed, whereby said judgment in favor of said Railroad Company was reduced to the sum of Nine Dollars; and whereas the said Yazoo & Mississippi Railroad Company and others have obtained a Writ of Error, and filed a copy thereof in the Clerk's office of said Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Greenwood Grocery Company, citing and admonishing it to be and appear at a Supreme Court of the United States, to be Holden at Washington within thirty days from the date thereof:

Now, therefore, if the said Yazoo & Mississippi Valley Railroad Company, and W. M. Whittington and A. F. Gardner shall prosecute their Writ of Errir to effect, and shall answer all damages and costs

if they shall make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE YAZOO & MISSISSIPPI
RAILROAD COMPANY,
By EDWARD MAYES,
Attorney in Fact.
W. M. WHITTINGTON,
By EDWARD MAYES, *Att'y.*
A. F. GARDNER,
By EDWARD MAYES, *Att'y.*
EDWARD MAYES,
J. C. LONGSTREET.

Filed March 29th, 1910.
GEO. C. MYERS,
S. C. Clerk.

36 *Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

In the cause in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in said suit between the said Yazoo & Mississippi Valley Railroad Company, as plaintiff, and the Greenwood Grocery Company, as defendant, and wherein judgment was rendered in favor of said plaintiff in said Court on the 28th day of February, 1910, against said defendant for the sum of Nine Dollars, and wherein, also, judgment was rendered in favor of the said defendant against the said plaintiff, allowing an off-set was in controversy between the parties; and in which suit was drawn in question the validity of certain statutes of the State of Mississippi, on the ground of their being repugnant to the Constitution of the United States, and the Amendments thereto, and to the statutes of the United States, and the decision of said Supreme Court was in favor of the validity thereof; and in which suit was also drawn in question the validity of cer- authority exercised by the Railroad Commission of the State of Mississippi, under the statutes of said State, on the ground that such authority, so exercised, was repugnant to the Constitution of the United States, and the amendments thereto, and to the statutes of the United States, and the decision of the said Supreme Court was in favor of the validity of such authority; and in which suit was also drawn in question the validity of a privilege and immunity claimed and set up by the said Railroad Company, under the Constitution and statutes of the United States, and under the Fourteenth Amendment to such Constitution, and the decision of the said Supreme Court was against the said privilege and immunity so set up and specially claimed; and a mani-

fest error hath happened, to the great damage of the said
37 Yazoo & Mississippi Valley Railroad Company, as by its complaint appears, we, being willing to the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you may have the same at Washington on the 28th day of April next, in the said Supreme Court, to be then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 29th day of March, in the year of our Lord, Nineteen Hundred and ten.

Witness, also, my signature, and the seal of the Circuit Court of the United States in and for the Southern District of Mississippi, this the day and year aforesaid.

[Seal U. S. Circuit Court, Southern District of Mississippi.]

L. B. MOSELEY,
Clerk Circuit Court, So. Dist. Mississippi.

Supreme Court of Mississippi.

I, Geo. C. Myers, Clerk of the Supreme Court of Mississippi, by virtue of the within Writ of Error, and in obedience thereto, do hereby send herewith the record and proceedings in said cause, duly certified and authenticated according to law, to the Honorable Supreme Court of the United States.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed, in the City of Jackson, in the State of Mississippi, this March 29th in the year of our Lord Nineteen Hundred and Ten, and of the Independence of the United States One Hundred and Thirty-four.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk Supreme Court of Miss.

[Endorsed:] Yazoo & Mississippi Valley Railroad Company vs. The Greenwood Grocery Company. Writ of Error.

38 UNITED STATES OF AMERICA, ss:

To the Greenwood Grocery Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Supreme

Court of the State of Mississippi, wherein the Yazoo & Mississippi Valley Railroad Company and W. M. Whittington and A. F. Gardner are plaintiffs in error, and — *where* defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. H. Whitfield, Chief Justice of the Supreme Court of the State of Mississippi, this the 29th day of March, A. D. 1910.

A. H. WHITFIELD,
Chief Justice of the Supreme Court of Mississippi.

UNITED STATES OF AMERICA,
Southern District of Mississippi:

Received the within citation on the 31st day of March, 1910, and served the same on the within named, the Greenwood Grocery Company on the 31st day of March, 1910, personally, by delivering to J. D. Duncan, who is the Manager of said Company, in his own hands, a true and exact copy of the same; also delivered to him at the same time a true and exact copy of the writ of error in the same cause, issued pursuant to the fiat of the Honorable Chief
39 Justice of the Supreme Court of Mississippi, by L. B. Moseley, Clerk of the Circuit Court of the United States in and for the Southern District of Mississippi.

This the 31st day of March, A. D. 1910.

FRED W. COLLINS, *Marshal,*
By F. W. COLLINS, JR., *Deputy.*

[Endorsed:] Entered No. 1706 page —. The Yazoo & Mississippi Valley Railroad Company vs. The Greenwood Grocery Co. Citation. Filed Ap'l 2/10. Geo. C. Myers, S. C. Clerk of Miss.

40 SUPREME COURT OF MISSISSIPPI, ss:

I, Geo. C. Myers, Clerk of the Supreme Court of Mississippi, do hereby certify that there was lodged with me as such Clerk on March 29th 1910 in the matter of the Yazoo & Mississippi Valley Railroad Co. vs. The Greenwood Grocery Company,

1. The original appeal bond of which a copy is herein set forth.
2. A copy of the writ of error as herein set forth.

In testimony *whereof*, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Jackson, Miss. this the 6th day of April A. D. 1910.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS, *Clerk.*

SUPREME COURT OF MISSISSIPPI, ss:

I, Geo. C. Myers, Clerk of the Supreme Court of Mississippi being the Court of said State which has highest, last and final jurisdiction

of all pleas and causes pending in the Courts of said State, do hereby certify that the foregoing are, full and correct copies of the papers, each and all of them, constituting the record in said Supreme Court of the State of Mississippi in the case of The Yazoo & Mississippi Valley Railroad Company versus the Greenwood Grocery Company No. 13954, including the judgment of said Court, the opinion of said Court, the petition for writ of error, the fiat granting said writ of error, writ of error bond, the original writ of error, citation and return thereon, all of which are now on file in my office, either the original or a copy, and which taken together, constitute the record in said cause in the Supreme Court of Mississippi.

Given under my hand and seal of said Supreme Court of Mississippi, at Jackson, in the State of Mississippi this the 6th day of April in the year of our Lord, One Thousand Nine Hundred and Ten, and in the One Hundred and Thirty Fourth Year of the Independence of the United States of America.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS, *Clerk.*

41 UNITED STATES OF AMERICA:

Supreme Court of the United States.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
v.
GREENWOOD GROCERY COMPANY.

Assignment of Errors.

Afterwards, to-wit, on the 29th day of March, 1910, before the Justices of the Supreme Court of the United States, at the capitol, in the City of Washington, comes the said Yazoo & Mississippi Valley Railroad Company and the said W. M. Whittington and the said A. F. Gardner, in error, by their, and each of their, attorney, Edward Mayes, and say that in the record and proceeding aforesaid there is damaging error in the particulars following, to-wit:

First. The said Supreme Court of the State of Mississippi erred in rendering the judgment of the 28th day of February, 1910, whereby the order of the Railroad Commission of the State of Mississippi, acting under the statute and the Constitution of said State, imposing a liability on the plaintiff in error, the Railroad Company, for delay charges in the form of demurrage in and about the delivery of interstate shipments, was upheld, and was held not to be repugnant to the Constitution of the United States and the amendments thereto, on the ground that the same was a regulation of interstate commerce, and on the ground that the same was a deprivation of the property of the said Railroad Company without due process of law.

And the Yazoo & Mississippi Valley Railroad Company and W. M. Whittington and A. F. Gardner pray that the judgment aforesaid

may be reversed, annulled and altogether held for nought, and that they may be restored to all things which they have lost by occasion of the said judgment.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
W. M. WHITTINGTON,
A. F. GARDINER,
By EDWARD MAYES, *Their Attorney.*

Endorsed on cover: File No. 22,163. Mississippi Supreme Court. Term No. 281. Yazoo & Mississippi Valley Railroad Company, plaintiff in error, vs. Greenwood Grocery Company. Filed May 12, 1910. File No. 22,163.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 54.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GREENWOOD GROCERY COMPANY, DEFENDANT IN ERROR.

Supplemental Reply Brief for Plaintiff in Error.

The excuse for this supplemental reply brief is the fact that counsel for defendant in error has advised us that on the argument he will rely upon the case of St. Louis, Iron Mountain and Southern Railway Company *vs.* Edwards (Arkansas), 127 Southwestern Reporter. It may be remarked parenthetically that the Edwards case is now pending in this court (No. 126) on a writ of error to the Supreme Court of Arkansas.

In the Edwards case the Arkansas Supreme Court seems to take the position that while the Interstate Commerce Act as amended gives the Interstate Commerce Commission jurisdiction of terminal charges, such as demurrage, yet that until the Commission exercises the power conferred by the Interstate Commerce Act, State railroad commissions still have the power to make

the rules in regard to demurrage, even as applied to interstate shipments.

While we think it is entirely immaterial whether the Commission has taken any action whatever in regard to demurrage and while we believe that mere action by Congress giving the Commission power in regard to terminal charges takes away any power of State commissions over this subject, yet in answer to the opinion of the Supreme Court of Arkansas in the Edwards case, we call the attention of this court to the fact that the Interstate Commerce Commission has repeatedly asserted its jurisdiction in this regard.

In conference rulings, Bulletin No. 5 of the Interstate Commerce Commission, rule 54, the Commission says:

> "Questions of demurrage and car service on interstate shipments are within the jurisdiction of the Interstate Commerce Commission, which does not concur in the view suggested by certain State commissions that such matters, even when pertaining to interstate shipments, are within their control."

In addition, in the case of Wilson Produce Company *vs.* Pennsylvania, 14 I. C. C. Reports, 170, the Commission elaborately reviews the subject and reaches the conclusion that it would be destructive of the Interstate Commerce Act for State commissions to attempt to regulate demurrage on interstate shipments. In that case the Commission said:

> "The subject is national in character, and uniformity of regulation is essential. If the individual States were permitted to legislate in this field, endless confusion and discrimination would be the result. Such legislation would operate as a direct burden upon interstate commerce and the Supreme Court has repeatedly refused to sustain State laws which had this effect."

A similar conclusion was announced by the Interstate Commerce Commission in the case of Peale, etc., vs. Central Railroad, etc., 18 I. C. C. Reports, page 53.

We especially call the attention of this court to these two decisions on account of the elaborate review in those decisions of pertinent decisions of this court on this subject.

In the opinion of the Supreme Court of Arkansas in the Edwards case, the case of Mason vs. C. R. I. & P. R. R. Co. (12th I. C. C. Reports, 61), is referred to. In that case the commission was asked to prescribe reciprocal demurrage rules and to impose a penalty upon carriers for failure to promptly deliver shipments. The matters involved in the Mason case arose in 1904 previous to the Hepburn amendment and the commission held in that case that it had no authority to make reciprocal demurrage rules. This court will of course recall that previous to the Hepburn amendment the Interstate Commerce Commission had no authority to definitely fix rates (157 U. S., 479), but its authority was confined to requiring carriers to cease and desist from charging certain rates or engaging in certain practices, and these orders of the commission had to be enforced in court. Under the Hepburn act the commission has positive authority for the fixing of rates, but as we understand the law the commission had jurisdiction both under the original Interstate Commerce Act and the Hepburn amendment over terminal charges and had the authority to require carriers to cease and desist from any unreasonable or improper practice.

As an instance of the Commission assuming jurisdiction over demurrage under the original Interstate Commerce Act, see the case of Pennsylvania Millers Association vs. P. & R. R. R., 8th I. C. C., 531.

It will be seen, therefore, that the Commission has taken jurisdiction of matters of demurrage both under

the original Interstate Commerce Act and under the Hepburn amendment.

In conclusion, in regard to this whole matter, we take the liberty of quoting, for the remainder of this brief, from an able discussion of the jurisdiction of the Commission over matters of demurrage, written by Hon. Edmund F. Trabue, of Louisville, Ky., counsel for the Louisville Car Service Association and a recognized authority. We repeat as follows from Mr. Trabue's paper on this subject:

Whatever doubts may have at any time existed as to the application of the Act to Regulate Commerce to demurrage charges on interstate shipments seem to be now removed. Such doubts were based upon the assumption that demurrage charges were penalties enforced by the carriers for a failure of shippers to promptly load and unload, and that the statute covered only rates for transportation. This theory, however, of the nature of demurrage charges is only partly correct, such charges partaking, clearly, of the nature of freight rates as well as penalties. Demurrage is a charge imposed by the carrier for the use of tracks and cars which ought to have been freed for use in transportation. For the general nature of demurrage charges see opinion of Sterling B. Toney, Circuit Judge, Jefferson County, Ky., 36 L. R. A., 855, Ky. Wagon Mfg. Co. *vs.* R. R. Co., etc., same case on appeal, 98 Ky., 152, 36 L. R. A., 850, 2 A. & E. R. R. Cas., n. s., 722; Miller *vs.* Ga., etc., R. R. Co., 50 A. & E. R. R. Cas., 88, 90; Y. & M. V. R. R. Co. *vs.* Searles, 37 A. & E. R. R. Cas., n. s., 465, and Mason *vs.* C., R. I. & P. R. R. Co., 12 I. C. C. Rep., 61.

That demurrage on interstate shipments is covered by the act, and that, therefore, the Interstate Commerce Commission has the same duties respecting it as of

freight rates, seems clearly to result from provisions of the act:

Section 1 provides that "transportation" shall include all facilities for shipment, etc., and all services in connection with the receipt, delivery, storage, etc.; and that "railroad" shall include switches and terminal facilities; also that if a common carrier fail to install and operate "any such switch" such shipper may make complaint to the commission.

Section 6 provides for schedules stating separately all "terminal charges, storage charges, icing charges, and all other charges which the commission may require," and makes provisions concerning the duties of the commission.

Section 12 authorizes the commission to inquire into the management of the business of the carriers, and requires and authorizes it "to execute and enforce the provisions of this act."

See, also, Sections 13, 14, 15, 16, 20, 22 as to the powers and duties of the commission.

These provisions concerning tracks, terminal and other charges seem clearly to cover demurrage charges, and the commission so rules; see Penn., etc., Asso. vs. P. & R. R. R. Co., 8 I. C. C. Rep., 331; Blackman Cases, 10 Ibid., 352; Kehoe vs. C. & W. Co., Nos. 763-4-5-6, 11 I. C. C., 166; Cudahy, etc. vs. C. & N. W. Ry. Co., 12 Ibid., 446.

In Bulletin 1, issued by the commission May 7, 1906, section 5, page 2, free storage is disapproved of under certain conditions.

Section 8, page —, advises that the commission has no power to relieve carriers from the obligations of tariffs providing for demurrage charges.

Section 25, page 7, advises that the commission has authority to permit a refund of drayage to a shipper

where the shipment has been routed contrary to express directions of shipper.

Section 31, page 8, announces that demurrage charges stand in the same light as transportation charges, and may be adjusted under Rule 75 of Tariff Circular 15-A.

Section 32, page 9, adjudicates on demurrage arising in cases of misrouting, citing Rule 51, Tariff Circular 15-A.

Section 39, page 10, forbids refunding demurrage charges in certain cases.

Section 54, page 3, declares:

> "Questions of demurrage in car service on interstate shipments, are within the jurisdiction of the Interstate Commerce Commission, which does not concur in the view that such matters, even when pertaining to interstate shipments, are within the control of State Commissions."

In Report 1336, June 3, 1908, McBride C. & C. Co. vs. C., St. P., M. & O. R. R. Co., the commission considered and decided the case submitted May 1, 1908, as if it were a rate case pure and simple, and in case 933, April 15, 1908, in matter of demurrage on privately owned tank cars, did likewise.

See also, Erie R. Co. vs. Wanague, etc., Co., 69 Atl., 168 (N. J. Court Er. & App.), March 2, 1908; in re DeMurrage on Tank Cars, 13 I. C. C., 378; N. Y. Hay, etc., Asso. vs. P. R. R. Co., 14 I. C. C., June 27, 1908, Case No. 1461; Wilson, etc., Co. vs. P. R. R., 14 I. C. C., June 24, 1908, Case No. 1472, "Traffic Bulletin," July 11, 1908; and Supp. 1 to Tariff Circ. 15-A, page 6, May 12, 1908.

The commission has assumed to make demurrage rules, e. g., the so-called "weather rule," as follows:

> "When the condition of the weather during the time prescribed for loading and unloading of cars or removal of freight is such as to render it

impossible to release cars or remove freight without serious damage to the freight, or when shipments are frozen so as to prevent unloading, car service or storage charges will be canceled or refunded."

By Tariff Circular 15-A, effective April 15, 1908, Section 81, the commission provides for the case of demurrage charges arising through the carrier's error.

In Michie *vs.* N. Y., N. H. & H. R. R. Co., 151 Fed. R., 694 (C. C.; Lowell, J.), the court, February 26, 1907, held, p. 695:

"The phrase of the statute, 'delivering, storage, or handling,' is broad enough to include demurrage."

In Houston, etc., R. Co. *vs.* Mayes, 201 U. S., 321-329, the reciprocal demurrage statute of Texas was held in conflict with the "Commerce Clause" of the Federal Constitution.

Car service on interstate shipments must be subject to Federal control, because interstate commerce does not end until delivery or reasonable opportunity therefor.

Rhodes *vs.* Iowa, 170 U. S., 412.
American Exp. Co. *vs.* Iowa, 196 U. S., 133.
Adams Exp. Co. *vs.* Same, Ibid., 147.
Adams Exp. Co. *vs.* Ky., 206 U. S., 129.
Am. Exp. Co. *vs.* Ky., Ibid., 139.

Respectfully submitted.

CHARLES N. BURCH,
EDWARD MAYS,
H. D. MINOR,
Attorneys for Plaintiff in Error.

BLEWETT LEE,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. [redacted] 54.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,

Plaintiff in Error,

vs.

GREENWOOD GROCERY COMPANY,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

EDWARD MAYES,
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BLEWETT LEE,
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E. H. Clarke & Bro., Memphis, Tenn. 44273

Supreme Court of the United States.

OCTOBER TERM, 1911

No. 281.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

GREENWOOD GROCERY COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

STATEMENT AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

May it Please The Court:

The Railroad Company, plaintiff in error, sued the Grocery Company, defendant in error, for the sum of $67.00, claimed for *demurrage* on cars. The Grocery Company undertook to offset this demand, to the extent of $58.00 by a claim against the Railroad Company for *delayage* penalties, under a rule of the State Railroad Commission. The *final question* is, whether that rule is valid as applied to interstate shipments.

The controversy originated in the court of a Justice of the Peace; and in such court, under the laws of Mississippi, formal pleadings are not used. The record shows the respective accounts which the parties filed. (See pages 7 and 9.)

The following are the material facts, and the cause of the litigation:

On the 8th of June, 1904, the Railroad Commission of Mississippi adopted certain rules providing for Demurrage and Delayage. These rules are fully set forth in the Appendix to this brief on p. 28, *et seq.* The material portions thereof are Rules 1 and XI, which are as follows:

"Rule 1. Railroad Companies shall within twenty-four hours after the arrival of shipments, give notice by mail or otherwise, to consignee of arrival of goods, together with weight and amount of freight charges due thereon and on goods in car load quantities, said notices must contain letters or initials of the car, number of the car, and if transferred in transit, the number and initial of the original car, net weight and the amount of freight charges due on same. No demurrage charge shall be made unless legal notice of arrival is given to consignee.

"Any Railroad Company failing to give such notice, *and to deliver such freight at its depots or warehouses, or, in case of shipment for track delivery, to place loaded cars at an accessible place for unloading, within twenty-four hours after arrival, computing from 7 a. m., the day following the arrival, shall forfeit and pay* the consignee, or other party whose interest is affected, the sum of $1.00 per car per day or fraction of a day, on all carload shipments, and one cent per one hundred (100) pounds per day or fraction thereof, on less than car load lots, with a minimum charge of five cents for any one package, after the expiration of said twenty-four hours."

"Rule XI. No other charge shall be made

for storage or demurrage except as provided in the foregoing rules, and if a railroad company is indebted to a shipper or consignee for delayage, then a claim for demurrage shall be offset by a claim for delayage."

The Railroad Company sued the Grocery Company for $67.00 demurrage, as shown above. The Grocery Company undertook, as stated above, to offset a delayage claim of $58.00, taking this course, apparently, under the rule XI above, and under the case of *Railroad Co. v. Keystone Lumber Co.*, 90 *Miss.*, 391.

The case found its way into the Circuit Court, and there, the trial being *de novo*, an agreed state of facts was made up, (Record, pp. 2-3), which is as follows:

"The following statement of facts is agreed on by and between the parties hereto, to-wit:

1

"The Yazoo & Mississippi Railroad Company, plaintiff, is a corporation and common carrier handling interstate railroad shipments into and out of Greenwood, Mississippi, with a switch yard, and side-tracks in Greenwood, and a side-track running to the warehouse of the Greenwood Grocery Company, which is situated on the right of way and grounds of the Yazoo & Mississippi Valley Railroad Company.

2

"The Greenwood Grocery Company, defendant, is a corporation doing wholesale grocery business at Greenwood, with its warehouse located as stated.

3

"Numerous cars containing interstate shipments consigned to the Greenwood Grocery Company at Greenwood, Mississippi, were received at different points on its line by the Yazoo & Mississippi Valley Railroad Company for delivery to the Greenwood Grocery Company at Greenwood and arrived there over the plaintiff's tracks. These cars were placed on the warehouse track of the defendant according to custom to be unloaded and there remained for the time shown by plaintiff's statement of claim filed herein before being unloaded by defendant.

"Plaintiff now claims and sues for demurrage for Sixty-seven Dollars ($67.00), which amount is admitted to be a reasonable charge and is admitted to be correct as shown by the said statement of said plaintiff; and that plaintiff is entitled to recover said amount, if the Court should refuse to allow set-off claimed by defendant.

"Numerous cars containing interstate shipments consigned to defendant at Greenwood were received by plaintiff at different points on its line of railroad for transportation and delivery to the defendant at Greenwood and arrived there over plaintiff's tracks. Plaintiff then held said cars in its yards at Greenwood for the various times shown by statement of defendant filed herewith which is admitted to be correct, without delivering them to the defendant. Defendant claims delayage under the rules of the Mississippi Railroad Commis-

sion for Fifty-eight ($58.00) Dollars, the same being figured on the basis of $1.00 per day per car, which is admitted to be a reasonable charge, and is admitted to be correct as shown by the statement above mentioned and asks that the same be allowed as an offset against the claim of plaintiff; defendant also tenders Nine ($9.00) Dollars difference in accounts, interest and court costs already accrued, which plaintiff refused.

5

"The issue herein submitted is whether or not defendant can offset in this action by plaintiff its claim for delayage on cars containing interstate shipments, received by plaintiff, but delayed in its yards at destination before delivery by plaintiff to defendant, as against claim of plaintiff for demurrage charges against the defendant which accrued at Greenwood, Mississippi, on cars containing interstate shipments to defendant and after plaintiff had notified defendant of the receipt of said cars and had placed them for unloading at defendant's warehouse, its place of business, according to custom, which cars were delayed in unloading as shown by plaintiff's statement; plaintiff's contention being that the delayage rules of the Mississippi Railroad Commission so far as they apply to delays arising after the arrival of cars in the yards of plaintiff at destination but before delivery at warehouse of defendant, are unconstitutional and void, if the cars contained interstate shipments.

"The copy of the demurrage and delayage rules of the Mississippi Railroad Commission hereto attached is correct and may be considered in evidence on the trial of this cause."

On the trial in the Circuit Court, the offset claimed by the defendant, the Grocery Company, was allowed; and judgment was rendered in favor of the Railroad Company for the difference only, of Nine Dollars. Thereupon, the Railroad Company took an appeal to the State Supreme Court, on which appeal the judgment of the trial court *was affirmed*. See, Railroad Company *vs* Grocery Company, 96 Miss., 403.

Hence this writ of error.

UNITED STATES OF AMERICA
SUPREME COURT OF THE UNITED STATES

THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO.

vs.

GREENWOOD GROCERY Co.

ASSIGNMENTS OF ERROR.

"Afterward, to-wit: on the 29th day of March, 1910, before the Justices of the Supreme Court of the United States, at the capitol, in the City of Washington, comes the said Yazoo & Mississippi Valley Railroad Company and the said W. M. Whittington and the said A. F. Gardner, in error, by their, and each of their, attorney, Edward Mayes, and say that in the record and proceedings aforesaid, there is damaging error in the particulars following, to-wit:

First: The said Supreme Court of the State of Mississippi, erred in rendering the judgment of the 28th day of February, 1910, whereby the order of the Railroad Commission of the State of Mississippi, acting under the statute and Constitution of said State, imposing charges in the form of demurrage in and about the delivery of interstate shipments, was upheld, and was held not to be repugnant to the Constitution of the United States and the amendments thereto, on the ground that the same was a regulation of interstate commerce, and on the ground that

the same was a deprivation of the property of the said Railroad Company without due process of law.

And the said Yazoo & Mississippi Valley Railroad Company and W. M. Whittington and A. F. Gardner pray that the judgment aforesaid may be reversed, annulled and altogether held for nought, and that they may be restored to all things which they have lost by occasion of the said judgment.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
W. M. WHITTINGTON,
A. F. GARDNER,
By EDWARD MAYES,
Their Attorney.

ARGUMENT

The specific question presented by this Writ of Error, is this: Whether those provisions in the Commission rules which subject railroads to penalties, whenever they shall fail to place on the team tracks at accessible places within twenty-four hours, such cars as are shipped for track delivery, etc., do or do not, as applied to interstate traffic, contravene the powers conferred on Congress, to regulate commerce between the States.

This question may be considered from two points of view: 1, From that of the effect of the enactment by Congress of the act of June 29, 1906, commonly called the Hepburn act, and of its exclusion of all State power to regulate interstate commerce, even locally; and, 2, from that of the

applicability of the decision of this Court in the case of Houston R. R. Co. v. Mayes, 201 U. S., 321.

We shall treat the question, briefly, from both points of view.

The Hepburn Act

This Act is brought into view in two ways: (1) of the $58.00 so allowed, as shown above, as an offset by the State Court, $18.00 accrued after the date of the Hepburn Act, and, consequently, after the rule of the State Commission had been set aside by that Act, and the $18.00, therefore, constituted no liability whatever against the Railroad Company; (2) even conceding, for the argument, that the Grocery Company had an enforcible claim against the Railroad Company for delayage, still it could not be offset against demurrage charges, because of the Hepburn Act, for that statute expressly forbids the making of any offset against the freight charges, which we conceive include demurrage, and required such charges to be paid in money, in effect.

In Covington Bridge Co. v. Kentucky, 154 U. S., 204, and other cases, this Court has declared that the adjudications of this Court upon the general subject of the respective powers of Congress and of the States over commerce, are divisible into three classes: First, those in which the power of the States is exclusive;, Secondly, those in which the States might act in the absence of legislation by Congress; and, Thirdly, those in which the action (power?) of Congress is exclusive, and the States cannot act at all (whether, as we understand it, Congress shall act or not).

In that same case, this Court said, also, that those respective powers "have been the subject of such frequent adjudication by this Court . . . that each case as it arises, must be determined upon principles already settled, as falling on one side or the other of the line of demarcation between the powers belonging exclusively to Congress and those in which the action of the State may be concurrent."

The exact case now presented, has not, we believe, been heretofore presented to this Court: i. e., the power of the State to regulate deliveries at team tracks of interstate shipments. *For purposes of this argument*, and treating it as a case to be "determined upon principles already settled," we might concede that the general tendency of this Court's decisions has been such as to indicate that it would be classed as an instance of concurrent jurisdiction, or power, the exercise of which by the State, if in true "aid of commerce", and not laying an undue burden on commerce, would be upheld—in the absence of action by Congress.

But we submit that, by the Hepburn Act, Congress has acted; and that therefore the States are without any further power in the premises.

The provisions in the Hepburn Act on which we rely, are the following (Fed. Stats. Ann., Sup. 1909):

> "Sec. 1. . . . . The term 'railroad' as used in this Act, shall include all bridges and ferries used or operated in connection

with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease, and *shall also include all switches, spurs, tracks, and terminal facilities of every kind used* or necessary in the transportation of the persons or property designated herein, *and also all freight depots, yards, and grounds used or necessary in the transportation or delivery* of any of said property; *and the term 'transportation' shall include* cars and other vehicles *and all instrumentalities and facilities of shipment or carriage*; irrespective of ownership or of any contract, express or implied, for the use thereof *and all services in connection with the receipt, delivery*, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and *handling of property transported*; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon *reasonable request* therefor and to establish through routes and just and reasonable rates applicable thereto."

There are other pertinent provisions scattered throughout the Act: *e. g.*, the provision which requires that any common carrier subject, etc., shall, on application, put in, maintain and operate, switch connections for private side-tracks for shippers, and gives the Interstate Commission jurisdiction over complaints about the same.

Note, also, the provisions of Section 6, as amended, in respect to the schedules required to be filed with the commission. Those schedules

are required to show, not only the rates, charges, (including terminal charges) etc., but also "all *privileges or facilities granted or allowed* and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, *or the value of the service rendered* to the passenger, shipper or consignee. . . . . The provisions of this section shall apply to all traffic, transportation, and *facilities defined* in this Act. . . . nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, *nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.*"

> "Any person . . . . . for whom as consignor or consignee any such carrier shall transport property, . . . who shall knowingly, by employe, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a *rebate or offset against the regular charges for* transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition *to any penalty provided by this act forfeit* to the United States a sum of money," etc. (Sect. 1, Elkins Act as Amended June 29, 1906.)

In the statute there is no specific provision about track deliveries or other deliveries, or the time allowed therfor, etc. If there had been such

specific provision, there would be no room for argument. But the statute does, in general terms, make provision about the "terminal facilities", the "switches, spurs and tracks," the *services* in connection with delivery", etc., etc.; and we contend that those general terms, taken in connection with the general intendment of the whole Act, constitute such legislation by Congress as excludes any power of the States to legislate about the delivery of interstate shipments.

When the attention of this Court is directed to the fact of the introduction by the Hepburn Act of those new and important features into the Interstate Commerce legislation by Congress, It hardly remains necessary to enlarge upon the significance of that fact. It is in line with, and is illustrated and emphasized by, the whole trend of recent Congressional legislation; the Safety Appliance laws, the Employers' liability Acts, etc. The general and increasing intent to harmonize and unify, is evident, nor can it be needed that we shall enlarge upon the proposition that since that legislation the earlier decisions, State and Federal, however correct and just, as and when they were made, cannot now be taken as controlling in respect to cases arising thereunder.

Of course it is true that the primary objects of the Hepburn Act were to secure, so far as possible, uniformity and fairness in rates, and to prevent unjust and unfair discriminations. The accomplishment effectually of those primary objects,

however, carries necessarily, as a means and an aid thereto, many incidental and subsidiary matters; and such matters, because they are aids and a means to the greater ends, are just as much within the purview of the statute as are the principal objects themselves. Hence, we find all through the statute those terms and phrases, pointed out above, which are not immediately applicable to the matter of rates, such as "facilities," "service," etc. Indeed, the notional connection between the character and extent of service, the character and extent of facilities, the use of tracks and terminals, and the uniformity and control of them and each of them, on the one hand, and the matter of rates and charges, and the uniformity and fairness thereof, on the other—is manifest. To establish rates and charges applicable generally and uniformly, while at the same time it is left open to the States to establish by law requirements about terminal services, facilities and privileges, which are variant and sporadic, would be obviously unfair and conducive to discriminations. An uniform scale of rates, to be uniform in truth, must be based on an uniform scale of privileges and service. The mere mileage between the extremes of the haul is not, and cannot be, the sole factor in the calculation; and to make it such sole factor, would be to work a practical inequality between shippers; or certainly would afford the States opportunity to work such inequalities as would directly tend to defeat the primary purposes of the act.

For illustration, take the city of Bristol, Virginia—Tennessee, which lies in two States, and is bi-sected by an intangible line. May Virginia impose a penalty of $25.00 per car per day for delay in placing a car on a team-track, while Tennessee shall impose one of one dollar per day? Or may Virginia require such car to be placed in twenty-four hours, absolutely, while Tennessee shall allow three days, and provide for strikes and other unavoidable delays?

If so the consignees in one State have a great advantage over those in the other, although living in the same locality; because, out of the many delays, commonly and unavoidably occurring, the shippers in one State can offset heavier delayage, and reduce their freight charges to a much greater extent than can those of the other; or, if the railways can and do find it practicable to place cars in each State within the time limits fixed by each, then the citizens in one are secured a prompter and more efficient service than those of the other.

However all this may be, we submit that the intent and the effect of the Hepburn Act is to place all these matters under the immediate control of the Federal agencies, including the terminal facilities and service for interstate shipments; and that the States have now no power whatever over that matter. The Act itself expressly declares that the term "transportation" shall include all facilities and "all *services* in connection with the receipt, delivery . . . . and handling of property transported."

This Court, in Texas R. R. Co., *v.* Abilene Co., 204 U. S., 426, considered the question whether, consistently with the general purpose of the Act to Regulate Commerce, a State court could entertain a suit by a shipper to recover an alleged overcharge, without a prior ascertainment by the Interstate Commerce Commission that the rate charged was unreasonable. It was a question, not about the express provisions of the Act, but of its necessary, although implied and incidental, result. This Court, amongst other things, said (pp. 440-441):

> "If without previous action by the Commission, power might be exerted by Courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the Courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would

destroy the prohibitions against preferences and discriminations, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

In this passage is clearly recognized and enforced the propositions: (1) that the Act carries all such powers to the Commission, even impliedly, as shall be necessary to preserve the consistency and effectiveness of the scheme of supervision intended, whereby discriminations are to be avoided; and (2) that what is to be guarded against is not only such discriminations as the railroads might be guilty of, but also those which might come about by the inconsistent action of the States themselves.

State *v.* Adams Express Co., (Ind., 1908) 171 Ind., 138, 19 L.R.A. (N.S.) 93, is a case in which the Hepburn Act is examined and applied. The Court held that because of those features of the act on which we rely, an Indiana statute requiring express companies to make free deliveries of express matter, in cities of 2,500 inhabitants or more, was void; and it was so held, notwithstanding the fact that by an earlier decision the same Court had decided in 1905 that the *common law duty* of an express company was so to deliver packages, and also that there was nothing in the Interstate Commerce Act, as it then was framed, which assumed jurisdiction over that matter.

"It is equally clear, in our opinion, that the interstate commerce act and the railroad rate law occupy the whole field, so far as any question is here raised concerning the transaction of interstate commerce by express companies."

Missouri Pacific R. R. Co. *v.* Larrabee Co., 211 U. S., 612, does not conflict with our contention. The language of the opinion must be referred to the case before the Court. It was merely a controversy over a switching service, done by the railroad company locally, as a member of a car-service association. The railroad company had not claimed that the service constituted a part of interstate commerce. In the conclusion of the opinion, Mr. Justice Brewer distinguishes the McNeill case, 202 U. S., 543, by saying explicitly that there was the "substantial distinction" that in the *McNeill* case the order held to be void "affected the movement of the cars prior to the completion of the transportation."

Nor did the *McNeill* case itself involve the Hepburn Act. It was decided in May, 1906.

It cannot be argued that St. Louis R. R. Co. *v.* Arkansas, 217 U. S., 136, negatives our proposition by implication. True that case was decided in April, 1910, and its decision is not based on the Hepburn Act; but the suit was for penalties incurred prior to the passage of that act, the latest violation of the rule and law in controversy having taken place in January, 1906. The Hepburn Act was not involved, therefore.

Hardwick v. Chicago Ry. Co. (Minn., 1910) 110 Minn., 25, 124 N. W., 819, is in practically the same attitude with the instant case. The Minnesota Court holds that the State statute does not conflict with the Hepburn Act; that it is in aid of commerce, etc. We submit that such decision is erroneous: the statute does "conflict" with the Hepburn Act in the constitutional sense: i. e., it undertakes to cover the same ground; and whether "in aid of commerce" or not is immaterial; that being a material consideration only in those cases where Congress has not acted. It might easily happen that what a State legislature might deem to be in aid of commerce, the Congress and the Interstate Commission might have a different opinion about. The very flexibility (which really means diversity) of State legislations which the Court lauds, is one of the things which the Hepburn Act was intended to stop, insofar as it applied to interstate commerce.

There seems to be, in this case as in many of the cases, a confusion of ideas; a conception that State legislation, in order to constitute a regulation of commerce, must lay an unreasonable burden on it. But of course this is inaccurate. State legislation may be in aid of commerce, but still be constitutionally objectionable. This is clearly recognized in Southern Ry. Co. v. Commonwealth, 107 Va., 771, when the Court says: "because it amounts to a regulation of inter-

state commerce, or to an unreasonable burden thereon, *in either of which cases* it is an infringement upon the powers of Congress, etc."

See

Southern R. R. Co. *v.* King, 217 U. S., 524, on p. 531-532.

Indeed it would seem clear that there is an important difference between that sort of legislation which affects commerce indirectly only, as by providing for the prompt furnishing of cars, the testing of eye-sight, the grade crossings, speed in cities, complement of crews, etc., on the one hand, and that other sort which, as in the case at bar, lays its hand on, and undertakes to regulate, control and dictate the very fact and processes of transportation and delivery. This was a distinguishing feature of the *McNeill* case.

It is difficult to see why the legislative direction that a carrier shall, as a part of the transportation, deliver here or there, and within this time or that, is not *regulation* without regard to whether the direction is beneficial or not; for regulation may, of course, be helpful or obstructive; and whether the one or the other, it is regulation still.

We now pass to the second proposition, of the application of this Court's decision in

Houston R. R. Co. v. Mayes.

If we are correct in the foregoing argument, the case is disposed of; if not, we still contend that

the decision below was erroneous, because, by the rules complained of, the State Commission laid an unreasonable burden on commerce, within the decision of Houston R. R. Co. *v.* Mayes, 201 U. S., 321.

The Mississippi Supreme Court denied this. What it said about that case, and all it said, was as follows:

> "An analysis of this case in the light of the facts easily distinguishes it from the case on trial. The case last cited involved the constitutionality of a Texas statute, which provided that whenever a shipper should make requisition, in writing, for a number of cars to be furnished at any point indicated within a certain number of days from the receipt of the application, and should deposit one-fourth of the freight with the agent of the company, the company on failing to furnish the cars should forfeit $25.00 per day for each car failed to be furnished; the only proviso being that the law should not apply in case of strikes or other public calamity. The Court held the statute void as applied to interstate commerce, but also said that the statute was not far from the line of proper police regulation. We do not think that any principle announced by the *Mayes case*, cited above, is controlling here, or that the contention of appellees in any way conflicts with the principles announced in either of the cases already cited."

And the Court proceeded to hold that the rules in question merely compelled the performance of a

duty already existing by the common law; that they are in aid of commerce, rather than an obstruction to it, and "operate after the transportation is completed."

It will be observed that in their opinion the State Supreme Court undertakes to distinguish between the *Moyes case* and this case; but they do so only by saying that the Texas law imposed the penalty denounced by it when the Company should fail to furnish within a certain number of days the cars demanded, "the only proviso being that the law should not apply in the case of strikes or other public calamity." The opinion, while it says that the cases are easily distinguishable, makes no pretense whatever at pointing out any facts or provisions which constitute the distinguishing elements other than that proviso.

But, we respectfully submit, the difference does not change the result. It is altogether immaterial. Indeed, if the fact that the exceptions given in the proviso to the Texas law were not sufficiently broad, and for that reason the law was condemned by this Court, *a fortiori* must these rules be void, which contain no exceptions whatever. If the Texas statute is unlawfully burdensome because its two only exceptions are not broad enough to cover all conditions which should have been excepted (and this Court so held) —then how can it be possible for these rules to be not unlawfully burdensome, *when they contain no exceptions whatever?* Are the rules less strin-

gent than the law? On the contrary, they are more so; and in so far as the rules differ from the Texas law, in this particular, the rules are even more obnoxious to the principle of the *Mayes case* than was that statute.

In the *Mayes case*, this Court pointed out the reason why the Texas statute laid an unconstitutional burden on commerce, and the Court said:

> "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, *we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the State, and amounts to a burden upon interstate commerce.* It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places within the same State. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather."

Is not precisely the same line of criticism applicable to the rules now under consideration,

only in a greater degree? Certainly it is so, for by the plain terms of these rules, in case of failure to place cars within the fixed time limit (and a short limit), the penalty follows, without any exception or excuse, whether of strikes or public calamity, or any other cause whatsoever.

It was on this very ground, and because of the *Mayes case*, that the Supreme Court of Appeals of Virginia held the rule of the State Commission to be void, in Southern Ry Co. *v.* Commonwealth, 107 Va., 771.

Consider, now, the practical working of these rules—not touching the matter of "strikes or public calamity" which this Court has already passed on. Consider, for illustration, the matter of a "sudden congestion of traffic" only. Suppose a big cotton crop year, and a sudden heavy demand on the railway company for many cars to be loaded with great numbers of large shipments, some from warehouses whence accumulated stocks are to be rushed to market. This is a demand not for cars only, but for trackage as well; and the cars would be useless without the trackage. The cars are supplied and the tracks are full. They are so filled lawfully, pursuant to demands made by shippers, and which demands, if the Company fail to meet, penalties will be incurred for such failures, under and by virtue of these same Commission rules. The shippers are engaged in loading such cars, and the tracks are filled with their cars so being loaded. In such case, cars from abroad,

loaded with logs or brick, arrive, and there will be no room on the team tracks within twenty-four hours. What is the Company to do? Pull away the cotton cars in the course of loading, and stop that work, when, perhaps, the market is falling every day? Or pay penalties for not doing so? Or pay penalties to the interrupted shippers if they do?

Or, again, suppose the team-tracks are already filled by extraordinary traffic when such cars arrive, and so filled with loaded cars awaiting their consignees' acceptance and unloading. The rules now allow consignee 48 hours free time (not including Sundays or legal holidays) in all cases, to unload; and in certain cases five days, and seven days free time (rules 3 and 4, Rec. p. 4). If one consignee, or one set of consignees, is entitled to have the cars placed, and then free time ranging from two to seven days allowed, in which to unload; but, still the rules provide also that all other cars coming in, without exception, shall be placed, in one day—how is it to be done? And is not a burden laid upon commerce?

Suppose any other case of sudden congestion in the traffic which entailed a congestion of the track facilities. Certainly the rule announced in the *Mayes case* would apply to that sort of congestion equally well. And the Commission rules which may easily place the railroad company in such a dilemma, are a burden laid on commerce.

St. Louis R. R. Co. *v.* Arkansas, 217 U. S., 136.

It cannot be objected that no such instance is in fact shown by this record. The constitutional validity of a law or administrative rule is to be tested, not by what has been done under it, but by what may be done.

Southwestern R. R. Co., *v.* Common, 107 Va., 771;

Stewart *v.* Palmer, 74 N. Y., 191;

St. Louis, etc., R. R. Co., *v.* State, (Okla., 1910) 107 Pac. 929.

We shall notice a few of the later State decisions, but briefly. It will be observed that every one of them recognizes, in one way or another, by the manner in which they seek to avoid it, that the *Mayes case* applies to a statute or rule like the one we now complain about.

In Patterson *v.* Missouri Pacific R. R. Co. (Kan. 1908) 77 Kan., 236, 94 Pac., 138, the Court avoided the *Mayes case* by pointing out the fact that the exceptions allowed by the Kansas statute were broader. That law excepted "strikes, *unavoidable accidents* or other public calamities"; and, defining the word "accident" as an undesigned contingency, a happening without intentional causation, etc., that car service act was held to be, therefore, constitutional, consistently with the *Mayes case*. Precisely like that case is, Chicago R. R. Co. *v.* Beatty. (Okla., 1911) 118 Pac. Rep., 367.

In Southern Ry. Co. *v.* Atlanta Sand Co. (Ga. 1910) 135 Ga., 35, 68 S. E., 807, the Hepburn Act is not considered; and the Georgia rule and statute were saved *by construction*, from the condemnation of the *Mayes case*, the Court holding that the legislature did not mean to exclude reasonable defenses. Confessedly, this construction was placed on the act, in order to save its constitutionality.

Garrison *v.* Southern Ry. Co., 150 N. C., 575, was an *intra*state shipment; and by construction of the statute, reasonable defenses were admissible, and the principle of the *Mayes case* avoided.

The present case is alone in that it undertakes to say that the *Mayes case* does not apply, without giving any reason whatever for the assertion.

Finally, we submit that when the State Court asserts that the rule complained of "operates after the transportation is completed", it clearly errs in that respect; and contradicts at once the agreement of record, the general result of the decisions by this Court (Heyman *v.* Southern R. R. Co., 203 U. S., 270; McNeill *v.* Southern R. R. Co., 202 U. S., 543), and the definition of what is "transportation" in the Hepburn Act itself.

For the foregoing reasons we submit that the decision of the Court below should be reversed.

Respectfully submitted,

EDWARD MAYES,
CHARLES N. BURCH,
Attorneys for Plaintiff in Error.

BLEWETT LEE,
Of Counsel.

APPENDIX

Demurrage and Delayage Rules Fixed by the Mississippi Railroad Commission, June 8, 1904.

Effective June 18, 1904.

S. D. McNair, President.
R. L. Bradley, J. C. Kincannon,
Commissioners.
T. R. Maxwell, Secretary.

Demurrage and Delayage Rules, Adopted June 8, 1904, and Effective June 18, 1904.

Rule 1. Railroad Companies shall, within twenty-four hours after the arrival of shipments, give notice by mail or otherwise, to consignee of arrival of goods, together with weight and amount of freight charges due thereon and on goods in car load quantities, said notices must contain letters or initials of the car, number of the car, and if transferred in transit, the number and initial of the original car, net weight and the amount of freight charges due on same. No demurrage charge shall be made unless legal notice of arrival is given to consignee.

Any Railroad Company failing to give such notice, and to deliver such freight at its depots or warehouses, or, in case of shipment for track delivery, to place loaded cars at an accessible place for unloading, within twenty-four hours after arrival, computing from 7 a.m. the day following the arrival, shall forfeit and pay the consignee or other party whose

interest is affected, the sum of $1.00 per car per day or fraction of a day, on all carload shipments, and one cent per one hundred (100) pounds per day or fraction thereof, on less than car load lots, with a minimum charge of five cents for any one package, after the expiration of said twenty-four hours.

Rule 2. Legal notice referred to in these rules may be either actual or constructive. Where the consignee is personally served with notice of the arrival of freight, free time begins at 7 o'clock a.m., on the day after such notice has been given. Constructive notice referred to consists of posting notice by mail to the consignee; provided, however, that if, in any case, where notice of arrival is given, by mail, the consignee will make oath that neither he, his agents, or employes have received such notice, then no demurrage charges shall be made until after legal notice as above specified, is given.

Rule 3. For all package freight not unloaded in depot or warehouse by Railroad Company within forty-eight hours, not including Sundays or legal holidays, computing from 7 a. m. on day following arrival, the Railroad Company may be subjected by the consignee to a charge for each day or fraction of a day that said freight remains in a car as follows:

In less than car load quantities not more than ten cents per ton of two thousand pounds per day.

In carload quantities, not more than ten (10) cents per ton of two thousand (2000) pounds per day.

When consignee resides more than three miles and within ten miles of the railroad station, five days free time will be allowed.

When consignee resides more than ten miles from the railroad station, seven days free time will be allowed.

Rule 4. Loaded cars, which by consent and agreement between the railroad and consignee, that are to be loaded by consignee, such as bulk meat, bulk grain, hay, cotton seed, lumber, lime, coal, coke, sand, brick, stone and wood, and all cars taking track delivery, which are not unloaded from the cars containing same within forty-eight (48) hours (not including Sundays or legal holidays), computed from 7 o'clock a. m., of the day following the day legal notice of arrival is given, and the car or cars are placed accessible for unloading, may be subject thereafter to a charge of demurrage of one dollar per car for each day, or fraction of a day, that said car or cars remain loaded in the possession of the Railroad Company, it being understood that said cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage; that when the period of such demurrage charges commence, they are to be placed accessible to the consignee for unloading purposes, on demand of the consignee; provided, however, that if the railroad company shall remove such car or cars after being so placed, or in any way obstruct the unloading of the same, the consignee shall not be chargeable with the delay caused

thereby, provided, further, that when any consignee shall receive four or more cars during any one day loaded with lumber, laths, shingles, wood, coal, coke, lime, ore, sand or bricks, and all cars taking track delivery, the said cars in excess of three shall not be liable to demurrage by any railroad company until after the expiration of seventy-two hours.

When consignee resides more than three miles and within ten miles of the railroad station, five days free time will be allowed.

When consignee resides more than ten miles from the railroad station, seven days free time will be allowed.

Rule 5. When consignee ships goods to order but express in their bills of lading the name of person at destination to notify, it shall be the duty of the railroad company to give legal notice to such party in the same way and under the same rule as if the shipment had been made to him. But when consigners do not comply with this condition, the notices may be addressed by mail to the consignee at point of delivery, and demurrage will begin as in other cases of notice by mail and the mailing of such notice shall be sufficient legal notice, whether the consignee actually receives the same or not.

Rule 6. Railroad Companies are authorized to store such property in public warehouses at the expense of the owner, if same is not removed before demurrage charges attach, provided, that storage charges on such freight shall not exceed the demurrage allowed under their rules.

Rule 7. Whenever the weather during the period of free time is so severe, inclement or rainy that it is impracticable to secure means of removal, or where, from the nature of the goods, removal would cause injury or damage, such time shall be added to the free period, and no demurrage charges shall be allowed for such additional time.

Rule 8. Railroads shall not discriminate between persons or place in storage or demurrage charges. If a railroad company collects storage or demurrage of one person under the demurrage rules, it must collect of all who are liable. No rebate, drawback or other similar devise will be allowed.

If demurrage is collected by a railroad company at one point on its line, it must collect at all of the places on its line, of those liable under the rules of this commission, that the commission shall hear and grant applications to suspend the operation of the rule whenever justice shall demand this course.

Rule 9. Whenever a shipper makes a verbal or written application to a railroad company for car or cars to be loaded with any kind of freight embraced in the tariff of said company stating the articles and destination, the railroad company shall furnish same within five (5) days from seven (7) o'clock a.m. the day following such application or when the shipper making such application specifies a future day on which he desires notice thereof, computing from 7 o'clock a.m., the day following such notice, the railroad company shall furnish such car or cars on the

day specified; provided, that if the movement of cars is suspended on account of accident or other causes not within the power of the railroad company to prevent, such period shall be added to the five days' time allowed in this rule.

For failure to comply with this rule the railroad company shall pay to the shipper a delayage charge of $1.00 per car per day, or fraction thereof, after the expiration of free time, upon demand in writing in thirty days' (30) *days* thereafter.

Rule 10. Cars detained or held on account of shipper's failure to load, or for want of proper shipping instructions, or by reason of improper loading, when loading is done by shipper, shall be subject to demurrage charges of $1.00 per car per day, or fraction thereof, so detained.

Rule 11. No other charge shall be made for storage or demurrage except as provided in the foregoing rules, and if a railroad company is indebted to a shipper or consignee for delayage, then a claim for demurrage shall be offset by a claim for delayage.

Rule 12. These rules apply only to places where Car Service Rules are in operation.

Rule 13. When both cars and track are owned by the same party, no charge for demurrage will be made. When private cars are detained on the tracks of other firms or individuals, or on the tracks belonging to or operated by members of this association, or

cars belonging to the latter upon private tracks, the established charge will apply.

Rule 14. At junction points where consignee's track is located on one road, and cars are received by a connecting road, it shall be the duty of the said connecting road to switch and deliver such cars to the road on which consignee's sidetrack is located within twenty-four hours from 7 o'clock a. m. after the time of the arrival; and of the road on which consignee's side track is located to switch and place such cars on said side track within twenty-four hours from 7 a .m. after the time of delivery by the receiving road.

Failure in this regard shall subject either road to delayage charge of one dollar per car per day or fraction thereof, provided, this shall not prevent the charge and collection of established or reasonable switching charges by the road on which said side track is located, and providing, further, that if said side track without fault of the railroad, is blocked so that delivery cannot be made, the time it remains blocked shall be added to the free time specified herein.

Rule 15. In all computation of time under the rules Sundays and legal holidays are to be excluded.

S. D. McNAIR, *President.*
R. L. BRADLEY,
J. C. KINCANNON,
Commissioners.

Attest:
T. R. MAXWELL, *Sec'y.*

In the Supreme Court of the United States

October Term, 1912.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs. No. (281) 54

GREENWOOD GROCERY COMPANY,

Defendant in Error.

REPLY BRIEF FOR THE PLAINTIFF IN ERROR.

May it Please the Court:

I.

HEPBURN ACT INVOLVED ON THIS WRIT OF ERROR.

It is insisted in the brief of defendant in error that the application of the Hepburn Act to the matters involved in this cause can not be considered in this Court for the reason that the Hepburn Act was not considered in the court below. In the brief of defendant in error it is stated, on page 2, as follows:

> "It appears from the record that the whole contention in the lower Court was upon the question as to whether or not this rule of the Mississippi Railroad Commission, imposing liability upon the Railroad Company, was repugnant to the Constitution of the United

States and in contravention of the Interstate Commerce Act,"

And on pages 15 and 16, as follows:

> "We submit that the plaintiffs in error in the Court below, not having invoked the question of the rule of the Mississippi Railroad Commission as being in contravention of the Hepburn Act, and there not being in the Record any assignment of error whereby complaint is made of the action of the lower Court in disregarding the provisions of the Hepburn Act, that such question should not be considered by this Court upon the present record.
>
> * * * * * *
>
> "We do not contend that this Court has no jurisdiction of the case under the writ of error directed to the Supreme Court of the State of Mississippi. A Federal question was raised, viz., that the rule of the Railroad Commission contravened the Interstate Commerce Act."

These contentions resolve themselves into the proposition that while the Commerce Clause of the Federal Constitution and the original Interstate Commerce Act were considered by the Supreme Court of Mississippi, and the repugnancy or lack of repugnancy of the delayage rules of the Mississippi Commission to the Commerce Clause of the Federal Constitution and the original Interstate Commerce Act was passed upon by the Supreme Court of Mississippi, yet, that the Supreme Court of Mississippi did not pass upon the

repugnancy of the delayage rules of the Mississippi Commission to the Hepburn Act.

In this contention we think that counsel for defendant in error is clearly mistaken.

By reference to the record (page 2) it will be seen that in the agreed statement of facts in the court of the justice of the peace, the issue was sharply raised as to whether the delayage rules of the Mississippi Commission had any application to interstate commerce.

In the fifth clause of the agreed statement of facts the issue is thus stated:

> "Plaintiff's contention being that the delayage rules of the Mississippi Railroad Commission so far as they apply to delays arising after the arrival of cars in the yards of plaintiff at destination but before delivery at warehouse of defendant, are unconstitutional and void, if the cars contained interstate shipments." (R. p. 3.)

Furthermore, in the opinion of the Supreme Court of Mississippi (R. p. 20), it will be seen that the court elaborately considers the question as to whether the delayage rules of the Mississippi Commission amount to a regulation of interstate commerce, and while the court does not specifically refer to or quote from the Commerce Clause of the Federal Constitution or from the Interstate Commerce Act, or from the Hepburn Act, it is perfectly apparent from the opinion that the court had under consideration *all* Federal laws in any way regulating interstate commerce. In the opinion of the court, in stating the case, the

Chief Justice of the Mississippi Supreme Court said:

> "It is agreed that the cars about which the Greenwood Grocery Company claims the right of reciprocal demurrage contained interstate shipments. The real issue in the case is whether or not the Greenwood Grocery Company can offset its claim for reciprocal demurrage against the claim of plaintiff for demurrage charges against it. It is asserted by appellant that this cannot be done, for the reason that the cars contained interstate shipments, and to allow this offset would be in violation of *the federal laws.*"

The Federal laws referred to by the Mississippi Supreme Court evidently, from the whole opinion, included all Federal laws covering the field of Interstate commerce, as well as the Commerce Clause of the Federal Constitution.

Independently, however, from what has been shown above from the record, the Hepburn Act was involved and considered for another reason. Counsel for defendant in error admits that the Commerce Clause of the Federal Constitution and the Interstate Commerce Act were considered in the opinion of the Supreme Court of Mississippi. The error into which counsel has fallen is in treating the original Interstate Commerce Act and the Hepburn Act as entirely two separate and distinct legislative acts. On the other hand, they are one act.

The original Interstate Commerce Act was approved February 4th, 1887, and the title of the

Hepburn Act, which was approved June 29th, 1906, is as follows:

> "An Act to Amend an Act Entitled 'An Act to Regulate Commerce,' Approved February Fourth, Eighteen hundred and eighty-seven, and all Acts Amendatory Thereof, and to Enlarge the Powers of the Interstate Commerce Commission."

The effect of an amendatory act and its relation to the original act are well settled. Says Mr. Black, in his work on the "Interpretation of Laws," Section 13:

> "When an amendment to a statute is adopted, there are not two separate enactments, the old and the new, but by their union there is produced one law, namely, the statute as amended."

Again, the same author says (Section 131), viz.:

> "An amendment of a statute by a subsequent act operates precisely as if the subject-matter of the amendment had been incorporated in the prior act at the time of its adoption, so far as regards any action had after the amendment is made. For it must be remembered that an amendment becomes a part of the original act, whether it be a change of a word, a figure, line, or entire section, or a recasting of the whole language."

In Blair v. Chicago, 201 U. S. 475, this court quoted approvingly from Farrell v. State, 54 N. J. L., 421, the same rule of construction, as follows:

> "As a rule of construction, a statute amended is to be understood in the same sense ex-

actly as if it had read from the beginning as it does amended. People ex rel., Parsons v. Circuit Judge, 37 Mich., 287. In Conrad v. Nall, 24 Mich. 275, a section in a chapter of the Code was amended, and it was held that it was not intended to operate independently of the other provisions of the chapter, but that the whole chapter, in its present form, must be read as one act.

"The rule is correctly stated in Endlich on Interpretation of Statutes, Sec. 294, as follows: 'A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there, and the amendment itself so thoroughly becomes a part of the original statute that it must be construed in view of the original statute as it stands after the amendments are introduced and the matters superseded by the amendments eliminated.' "

The assignments of error show that they are directed to the action of the Supreme Court of Mississippi in holding the delayage rules of the Mississippi Commission not repugnant to the Commerce Clause of the Federal Constitution as being a regulation of interstate commerce. We do not understand that it was necessary that either the Supreme Court of Mississippi in its opinion or the plaintiff in error in its assignment of error, should quote verbatim the Commerce Clause of the Federal Constitution or the Interstate Commerce Act or the Hepburn Amendment, or to make assignments of error as complete as an argument. It is only necessary to show that the Federal question was considered and determined—

and necessarily determined—by the Supreme Court of Mississippi.

In Bridge Proprietors v. Hoboken L. & I. Co., 1 Wall. 116, this Court said:

> "Now, although there are other decisions in which it is said that the point raised must appear on the record, and that the particular Act of Congress, or part of the Constitution supposed to be infringed by the state law, ought to be pointed out, it has never been held that this should be done in *express words*. But the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

The point in the above excerpt is that no express words are necessary. In the case at bar it is perfectly apparent from the whole record, including the decision of the Supreme Court of Mississippi, that the Commerce Clause of the Federal Constitution and the Interstate Commerce Act, including the Hepburn Amendment ("Federal laws," as they are denominated by the Supreme Court of Mississippi) were considered, and the delayage rules of the Mississippi Commission held to be not repugnant thereto.

II.

DELAYAGE RULES IN CONFLICT WITH PROVISIONS OF ORIGINAL INTERSTATE COMMERCE ACT.

But if we should be in error in regard to our contentions under the foregoing heading, still eliminating the Hepburn Act, the question in this Court is not substantially different for the reason that the delayage rules of the Mississippi Commission are in conflict with the provisions of the original Interstate Commerce Act, and attempt to cover the same field covered by the original Interstate Commerce Act.

By reference to the original Interstate Commerce Act it will be seen that the first section, among other things, provides as follows:

> "The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also *all the road* in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'transportation' shall include all *instrumentalities of shipment or carriage*:.
>
> "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or *in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.*"

Furthermore, the sixth section of the original act, as amended March 2nd, 1889, in providing what the schedules or tariffs of the carriers subject to the Act shall contain, states:

> "And shall also state separately *the terminal charges and any rules or regulations* which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges."

It will be seen therefore that the original Interstate Commerce Act not only provides fully as to rates for transportation, but further provides that the term "railroad" includes "all the road in use by any corporation operating a railroad," and the word "transportation" includes "all instrumentalities of shipment or carriage," and the Act also covers all services in connection with the transportation, and "for the receiving, delivering, storage or handling" of property carried. Also provides for stating separately terminal charges or any rules or regulations which in any wise affect or determine rates, fares and charges.

Under such provisions we think that it cannot be doubted that a rule of the Mississippi Commission under which a party may pay demurrage charges (which is a storage or terminal charge) with a claim for delayage penalties, does cover the very field already fully covered by the original Interstate Commerce Act.

Furthermore, both the original Act and the Hepburn Amendment contemplate the payment of

rates and charges, including demurrage charges, in money, and not in claims for delayage penalties, or claims for damage to freight, or claims for personal injuries, or claims on any other account.

In Louisville & N. R. Co. v. Mottley, 219 U. S. 467, this Court said:

> "The words of the Act, therefore, must be taken to mean that the carrier engaged in interstate commerce can not charge, collect, or receive for transportation on its road anything but money."

In the further case of Chicago I. & L. R. Co., v. United States, 219 U. S. 486, the constitutionality of a state statute authorizing railroad companies to issue transportation in payment for printing, advertising matter, etc., was held to be in violation of the Interstate Commerce Act. In the last mentioned case this Court says:

> "We need say but little about the Indiana statute upon which the defense is in part based. The transactions in respect of which the government seeks relief, being interstate in their character, the acts of Congress as to such transactions are paramount. No state enactment can be of any avail when the subject of such transactions has been covered by an act of Congress, acting within the limits of its constitutional powers. It has long been settled that when an 'act of the legislature of a state prescribes a regulation of the subject repugnant to and inconsistent with the regulation of the Congress, the state law must give way, and this without regard to the source

of power whence the state legislature derived its enactment."

As to the case of Western Union Tel. Co. v. James, 162 U. S. 650, much relied on by the defendant in error, it is sufficient to say that the court found in the James case that there was no legislation whatever of Congress covering the delivery of interstate telegrams, and on this ground the state legislation involved in the James case was held not repugnant to the Commerce Clause of the Federal Constitution.

One further observation occurs before ending this part of the discussion.

If a state railroad commission can provide for the payment of demurrage charges on interstate shipments with penalties prescribed by such commission on other interstate shipments for delay in transportation, then the provisions of the original Interstate Commerce Act, as well as the Hepburn Amendment, which give the Interstate Commerce Commission complete jurisdiction of terminal and storage charges, and prohibit any rebate by any device whatsoever, are emasculated and are rendered meaningless and nugatory, and the complete control which Congress has given to the Interstate Commerce Commission over interstate commerce has not been accomplished. The fundamental error in the argument of the defendant in error, as we conceive, is the failure of the defendant in error to give consideration to the complete solidarity of interstate commerce, and the control of Congress and the Commission therof.

If a consignee in Mississippi can pay terminal, storage or demurrage charges with delayage penalties of $1.00 per day per car, in Mississippi, then certainly a consignee in Alabama (if the rule of the Commission in that state so provide) can pay the same character of charges in delayage penalties of $2.00 per car per day, or in damage claims, or in personal injury claims. As the result, therefore, payments of charges covered by the Interstate Commerce Act could be made in a different way in every state in the Union and in such manner that while the Interstate Commerce Commission might fix rates and charges, yet the state commissions could completely undo the work of the Interstate Commerce Commission by fixing terms and methods of payment of such charges and the currency in which payable. The Act to Regulate Commerce is a consistent whole, and any state legislation or state commission order which impedes the Interstate Commerce Commission in the enforcement of the Act is necessarily void.

Southern Ry. v. Reid, 222 U. S. 424.
Southern Ry. v. Burlington, etc., (decided May 3, 1912, by United States Supreme Court.)

III.

DELAYAGE PENALTIES FIXED BY THE MISSISSIPPI COMMISSION ARE IN AND OF THEMSELVES A REGULATION OF INTERSTATE COMMERCE,—INDEPENDENTLY OF THE RIGHT OF SET-OFF AGAINST DEMURRAGE CHARGES.

Independently of the question of the payment of demurrage charges with delayage penalties, we insist that the delayage penalties in and of themselves lay an unreasonable burden upon interstate commerce.

In other words, if no demurrage charges were involved in this litigation and the suit was one by the Greenwood Grocery Company to recover penalties prescribed by the Mississippi Commission for delay in the transportation of interstate commerce, still, in such event, such suit must necessarily be dismissed on the ground that the delayage penalties regulate and lay an unreasonable burden on interstate commerce. This proposition we have already argued in the original brief, and we think the case of Houston etc. R. Co. v. Mayes, 201 U. S. 321, is conclusive.

Under the rule of the Mississippi Commission the delayage penalties accrue without regard to any excuse, however reasonable or valid, the carrier may have for delay in transportation. Even though the delay may have resulted on account of the carrier giving preferential attention to the business of the Government of the United States or the State of Mississippi, or in case the delay may be due to fire, pestilence or famine, or the press of other business, still the delayage penalties accrue, and the rule of the Commission permits no excuse. These considerations are fully set out in the opinion of this Court in the Mayes case, and need not be repeated.

It may be interesting to note, however, that while under the rules of the Mississippi Commission no reason, however good, on the part of the carrier will excuse any delay in making a delivery of interstate freight, (however unavoidable the delay may have been), yet when we turn to the rules of the Commission prescribing the demurrage which the carrier may collect from the shipper or consignee, we find numerous excuses available to the shipper or consignee, among others, under Rule 4 (R. p. 5), an extension of time is granted the consignee if the carrier shall in any way obstruct the unloading of freight, and an extension of time in case the consignee resides more than three miles from the station of the carrier, and a further extension of time when the consignee resides more than ten miles; also under Rule 7 an extension of time is allowed the consignee when the weather is severe, inclement or rainy, and a further indulgence is given by the rules to the consignee whenever the consignee receives four or more cars of certain commodities on any one day.

In other words, the rules of the Mississippi Commission give the consignee all manner of excuses by which to avoid demurrage charges, whereas no excuse whatever is allowed the carrier for any delay in making delivery of freight.

Certainly in the light of the Mayes case, such rules regulate and unreasonably burden interstate commerce.

See also St. Louis etc. R. Co. v. Arkansas, 217 U. S. 136.

In the brief of defendant in error the case of Missouri Pacific R. Co. v. Larabee Mills, 211 U. S. 612 is relied on. In regard to that case it is sufficient to say that in the statement of facts of the case by Mr. Justice Brewer, it is made clear that the whole controversy arose out of a dispute between the railroad company and the Larabee Mills over refusal of the Larabee Mills to pay some demurrage charges, and thereupon the railroad company (in the words of Mr. Justice Brewer), "refused to make further delivery to the mill company of *empty cars* placed on the transfer track for the use of the mill company by the Sante Fe in consequences of which the mill company, when desiring to ship any of its products from Stafford by the Sante Fe, was compelled to haul the same in wagons from its mill to the station of the Santa Fe and there load into cars."

Furthermore, in the course of the opinion, Mr. Justice Brewer said:

> "In addition, the hauling of the empty cars from the Santa Fe track to the mill was, if commerce at all, commerce within the state."

It is apparent, therefore, that the Larabee Mills case involved merely a question of the local switching of empty cars, and if this was commerce at all it was purely intrastate commerce. Hence the inapplicability of the Larabee Mills case to the questions involved in this case is apparent.

We insist, therefore, that the delayage rules of the Mississippi Railroad Commission are void as being not only a regulation of interstate commerce, and therefore void under the Commerce Clause of the Federal Constitution, but also amount to a taking of property without due process of law under the Fourteenth Amendment of the Federal Constitution, in that the delayage penalties accrue regardless of however unavoidable the delay may have been.

We respectfully submit, therefore, that the judgment of the Supreme Court of Mississippi should be reversed.

Respectfully submitted,
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NOTE—Italics in this brief ours.

United States Supreme Court

OCTOBER TERM, 1911.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
Plaintiff in Error.
vs.
GREENWOOD GROCERY COMPANY,
Defendant in Error.
No. 84

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

STATEMENT AND BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

This case is for review upon writ of error to the Supreme Court of Mississippi, and is presented upon an agreed statement of facts (pp. Record 2 & 3), the question involved being the power of the Railroad Commission of the State of Mississippi under certain reciprocal demurrage rules to impose liability upon the plaintiff in error for delayage of cars after arrival at destination.

These rules are set forth Record pp. 3-7.

The assignment of error appears on page 7 of the Brief for plaintiffs in error.

Two questions are raised and presented upon the Brief for the plaintiff in error.

First, that the rule of the Railroad Commission of Mississippi which imposed a liability upon the Railroad Company for delayage was repugnant to the Constitution of the United States and Amendments thereto, and was a regulation of Interstate commerce and further that the same was a deprivation of the property of the said Railroad Company without due process of law.

Second, that the said rule of the Mississippi Railroad Commission imposing such liability upon the Railroad Company for delayage was in contravention of the Hepburn Act.

We shall submit and insist that this second contention found upon the Brief for plaintiffs in error raises a question that does not appear to have been raised in the Court below and cannot now be considered in this Court in reviewing the judgment of the State Court.

Assignment of Error.

It appears from the record that the whole contention in the lower Court was upon the question as to whether or not this rule of the Mississippi Railroad Commission, imposing liability upon the Railroad Company, was repugnant to the Constitution of the United States and in contravention of the Interstate Commerce Act.

Congress shall have power (among other things) "to regulate commerce with foreign nations and with the several states and Indian tribes." Art. 1, Sec. 8, Par. 3, United States Constitution.

The meaning of the term, "regulate," must govern the decision in this case. If the word is held to mean that every act of a State Legislature, or of the Railroad Commission, which is a creature of the Legislature, is exercising

control over commerce between the states in the sense of impeding, obstructing and hindering it, we have no standing in court and this case should be reversed; but if the term shall be held to mean that the state may be permitted to pass such regulations, through its Railroad Commission as may affect commerce but will not impede, obstruct or hinder such commerce, the decision of the Court below should be affirmed.

The words, "to regulate commerce," used in the Constitution, are so very general and extensive that they might be construed to cover a vast field of legislation—they must, however, have a reasonable interpretation and the power should be considered as exclusively vested in Congress so far and so far only as the nature of the power requires. Some subjects call for uniform rules and national regulation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities and limited in their operation to such localities respectively; to this extent the power to regulate commerce may be exercised by the states.

Rule 10 of the Mississippi Railroad Commission is generally known as the reciprocal demurrage rule. Is it such a rule as will hinder, obstruct or impede commerce between the states? Is it rather not such a rule as expedites commerce and aids it, in that it permits no delays to the consignee in getting his goods delivered that are consigned to him; and to the buying public, in getting their goods from the consignee? And does it not further expedite commerce in that it forces the railroad companies promptly to deliver cars so that they may be unloaded promptly, immediately put back into the service of transportation and so avoid the car shortages and congestions which continually confront shippers during busy seasons and hamper the trade relations between the different sections of the

country? In short, is it not a *reasonable* requirement imposing no additional duty nor burden upon the carrier? The Keystone Lumber Company case, 90 Miss. 391, strongly asserts this argument, though in that case the shipments in question were not interstate shipments, and we cite it, not because it is decisive of the main issue involved in the instant case, but because the reasoning as to the reasonableness of the rule and the results of expeditious handling of freight is applicable as well to the case at bar as to the case cited. We believe that the court will find, after a thorough investigation, that the following is the true rule, to-wit:—where the rules and the laws passed by the state authorities expedite, aid and assist interstate commerce and impose no additional duty nor burden upon the carrier, they are not in contravention of the Federal Constitution; but where the rules and laws so passed, impede, hinder or obstruct interstate commerce, or place additional burdens thereon, they are in contravention of the Federal Constitution and therefore void, it being conceded that the Federal Constitution must govern where state laws do not conform to it, just as the Acts of Congress must govern where they contravene state laws; if Congress had passed a law regarding this particular phase of interstate commerce, the state laws in contradiction of or contrary to such law would be invalid; but until Congress acts, the states have the right to pass laws governing interstate commerce so long as they do not impede, obstruct, hinder or interfere with such commerce. This is the final test and we direct the Court's attention specially to this point in reading the decisions cited both by appellant and appellee. It will further be found that practically all the cases adjudging legislative acts invalid, so hold, because the acts created, in the way of a tax, license or condition, *a direct burden* on commerce, or in some way *directly interfered with its freedom*.

Gloucester Ferry Co. vs. Pennsylvania, 29 Law. Ed. U. S. 166.

Mobile County vs. Kimball, 26 Law. Ed. U. S. Sup. Ct. Rep. 238.

Smith vs. Alabama, 31 Law Ed. U. S. Sup. Ct. Rep. 508.

Escanab[illegible] Lake Mich. Transportation Company vs. Chicago, 27 Law Ed. U. S. Sup. Ct. Rep. 442-6.

Western Union Tel. Co. vs. James, 40 Law Ed. U. S. Sup. Ct. Rep. 1105-9.

Western Union Tel. Co. vs. Tyler, 44 Am. State Rep. 914-5.

Hennington vs. State of Georgia, 41 Law Ed. U. S. Sup. Ct. Rep. 166.

Sherlock vs. Alling, 23 Law Ed. U. S. Sup. Ct. Rep. 820.

In the last styled case, Mr. Justice Harlan ably reviews the authorities and sustains the proposition stated above.

"The line which separates the power of the states from this exclusive power of Congress is not always distinctly marked." Again, "It would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved."

Hall vs. DeCuir, 24 Law Ed. U. S. Sup. Ct. Rep. 548.

Cooley vs. Port Wardens, 13 Law Ed. U. S. Sup. Ct. Rep. 996.

Mobile County vs. Kimball, 26 Law Ed. U. S. Sup. Ct. Rep. 238.

Legislation may in a great variety of ways affect commerce and persons engaged in it without constituting the regulation of it within the meaning of the Federal Constitution. "The legislation of a state not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of the citizens and only indirectly and remotely affecting the operation of commerce is of obligatory force upon citizens within its territorial jurisdiction whether on land or water or engaged in commerce, foreign or interstate or in any other pursuit."

Sherlock vs. Alling, 23 Law Ed. U. S. Sup. Ct. Rep. 820, a discriminating case, cited in Western Union Tel. Co. vs. Tyler, 44 Am. St. Reports, 913.

State Tax on Gross Receipts, 21 Law Ed. U. S. Sup. Ct. Rep. 164, cited in Hall vs. DeCuir, 24 Law Ed. U. S. Sup. Ct. Rep. 548.

In the James case supra, the Court says, "The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in no wise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not in addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not. No tax is laid upon any interstate messages

nor is there any regulation of a nature calculated to at all embarrass, obstruct, or impede the company in the full and fair performance of its duty as a sender of interstate messages." Further it is said in the same case, "While it is vitally important that commerce between the states should be unembarrassed by vexatious state regulations regarding it, yet on the other hand there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class and in the absence of any legislation by Congress, the statute is a valid exercise of the power of the state over the subject."

40 Law Ed. U. S. Sup. Ct. Rep. 1108.

The James case is analagous to the case at bar; the delay in both cases occurred in delivery; the telegraphic message and the goods shipped were both interstate commerce within the meaning of the Federal Constitution.

Telegraph Co. vs. Texas, 26 Law Ed. U. S. Sup. Ct. Rep. 1067.
LeLoup vs. Port of Mobile, 32 Law Ed. U. S. Sup. Ct. Rep. 311.
and various other cases.

In the James case a penalty of $100.00 was imposed by the Georgia statute, a penalty of $1.00 per day was imposed by the rules of the Mississippi Railroad Commission. The ruling in the James case applies in toto to the case at bar. The Yazoo & Mississippi Valley Railroad cannot be embarrassed in any way by the imposition of the penalty. It is imposed

for the purpose of enforcing a general duty of the company which is required by its contract of carriage to deliver the shipment to the consignee; the law contemplates that the delivery be made within a reasonable time. This rule requires the same thing, so there is no additional duty nor burden imposed on it; and so far as the delivery of the freight is concerned, it simply prescribes a penalty for delay in delivery where the regulations of the company itself require such a delivery; it is certainly competent for the state to afford redress through her courts for the negligent delay of a railroad company in delivering freight from another state, and if this may be done, it is equally competent for the state to seek, by legislation in advance, to prevent such violation of duty.

Smith vs. Alabama, 31 Law Ed. U. S. Sup. Ct. Rep. 512, 1st Column. Cited in Western Union Tel. Co. vs. Tyler, 44 Am. St. Rep. 913-914.

In Chicago & North-western R. R. Co. vs. Fuller, 21 Law Ed. U. S. Sup. Ct. Rep. 711, a state statute of Iowa required, "that each railway company shall, in the month of September annually, fix its rates for the transportation of passengers and of freights of different kinds; that it shall cause a printed copy of such rates to be put up at all its stations and depots and cause a copy to remain posted during the year," and so failing to do, the company shall be liable to a penalty of $100.00 to $200.00 to the person injured and suing. The United States Supreme Court held the statute constitutional, valid and in a constitutional sense in nowise a regulation of commerce. The court in passing on the case said, "A failure to fulfil these requirements or the charging of a higher rate than is posted shall subject the offending party to the payment of the penalty prescribed. In all other respects there is no interference. No other constraint is imposed except in these particulars, the company

may exercise all of its faculties as it shall deem proper. No discrimination is made between local and interstate freights, no attempt is made to control the rates that may be charged. It is only required that the rates shall be fixed, made public and honestly adhered to. In this there is nothing unreasonable or onerous. The public welfare is promoted without wrong or injury to the company. The statute was doubtless called for by the interests of the community to be affected by it and it rests upon a solid foundation of reason and justice. It is not in the sense of the Constitution in any wise a regulation of commerce."

New York, New Haven & Hudson R. R. R. vs. State of New York, 41 Law Ed. U. S. Sup. Ct. Rep. 583 sustains a statute imposing a penalty for failure to heat passenger coaches used in interstate business. Says the Court, "the statute in question is not directed against interstate commerce; nor is it within the meaning of the Constitution a regulation of commerce although it controls in some degree the conduct of those engaged in such commerce." The same principle is sustained in Burgess vs. Western Union Tel. Co. 71 Am. St. Reports 833.

A number of cases are cited in the books holding various legislative acts invalid and contrary to the commerce clause of the Constitution because the legislation attempted is national in its scope or of such a nature as to admit of uniformity of regulation, affecting all of the states alike; in such cases, the power is exclusive of all state authority and is vested in Congress alone and all state laws contrary thereto are invalid.

Cooley vs. Board of Wardens, 12 Howard U. S. 299.
Welton vs. State of Mo. 23 Law Ed. U. S. Sup. Ct. Rep. 347.
Mobile County vs. Kimball, 26 Law Ed. U. S. Sup. Ct. Rep. 238.

Cardwell vs. Bridge Company, 28 Law Ed. U. S. Sup. Ct. Rep. 961.

There is a further line of cases wherein impositions are placed by the laws of the state on interstate commerce, the result of which legislation would be the creation of monopolies or restraining of trade by the protection of local industries at the expense of foreign industries. These laws are very clearly contrary to the commerce clause of the Constitution, for it was to prevent exactly this result that this clause was introduced. A violation of it in this particular would operate to the decided advantage of one state over another, would create a discrimination such as is abhorrent to the law.

Walling vs. People of Michigan, 29 Law Ed. U. S. Sup. Ct. Rep. 691 and cases cited.

The case of Bagg vs. Wilmington, etc., R. R. Co., 26 Am. St. Rep. 573 is directly in point. This was a case under a statute imposing a penalty for detention of freight after delivery for shipment, the goods being consigned by a party in North Carolina to a party in South Carolina, the suit being filed in North Carolina. It seems to be on all fours with the Keystone Lumber Company case, supra, except that in the Bagg case, the goods involved in the shipment were interstate commerce. The court says, "So long as state legislation is not in conflict with any law passed by Congress in pursuance of its powers and is merely intended and operates in fact to aid commerce and to expedite instead of hindering the safe transportation of persons or property from one commonwealth to another, it is not repugnant to the Constitution of the United States and will be enforced, either as supplementary to partial Federal Statutes relating to the same subject or in lieu of such legislation where Congress has not exercised its powers at all."

Again, in the same case, "The controlling principle which pervades all of the cases is that such legislation by the states is inhibited as impedes, obstructs or controls commerce or comes in conflict with some statute passed by Congress to regulate it."

The case of Gulf, Colorado & Santa Fe Ry. Company vs. Dwyer, 16 Am. St. Rep. 926, arose out of a Texas statute authorizing the imposition of a penalty on a railroad company for refusal to deliver freight to the consignee of the shipment on payment or tender of payment of charges shown in Bill of Lading, the shipment in question being from Pittsburg, Penn., to Brenham, Texas. The Court says, "A statute affording a remedy for the breach of a contract of carriage of goods between two states, but which imposes no tax, neither fixes nor regulates rates, makes no discrimination between commerce wholly within the state and that between the state and other states, applies to all carriers and contracts of carriage alike, imposes no new duty on the carrier and merely provides a penalty for the purpose of enforcing a compliance with an obligation already existing, is a proper exercise of the police power reserved to the state and therefore valid."

We do not consider that the McNeill case, 50 Law Ed. U. S. Sup. Ct. Rep. 1142 is in point; the decision went off on grounds altogether different from the grounds relied on by appellant for a reversal of the case at bar, and when the McNeill case is read in the light of the law pronounced in the cases cited in this brief, it is easily seen to be a very different proposition from the one now involved.

1. The North Carolina rule, which was in question in that case provided a penalty of $500.00 for each offense. This in itself was unreasonable and would have been invalid for that reason when applied even to a shipment of goods within the state, where no question of interstate commerce was involved.

2. The cars were required to be delivered beyond the right of way of the company and across private property; this too was an unreasonable and burdensome requirement, being "in its very nature a direct burden and regulation of interstate commerce," and, "imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce." No such question is involved in the case at bar. No additional duty was required from that imposed upon the company by its contract of carrier. The contract of carriage in the McNeill case could not have contemplated a delivery of the shipment beyond the railroad company's right of way across private property to the private siding; this was additional requirement, and as stated, imposed additional burden which rendered the order of the railroad company of North Carolina invalid.

3. The order was special as applies to the particular case and not a general order applicable to all cases. It was a *special discrimination* and comes under the condemnation of the various cases cited in this brief for that reason. If there was one idea in the minds of the drawers of the Federal Constitution when they inserted the commerce clause it was to prevent discrimination, to prohibit the very thing that the order of the North Carolina Commission would accomplish if it were allowed to stand.

That the foregoing is the true interpretation of the decision is manifest; the Court says:—"Without at all questioning the right of the State of North Carolina in the exercise of its police authority, to confer upon an administrative agency the power to make many *reasonable regulations*, concerning the *place, manner and time of delivery* of merchandise moving in the channels of interstate commerce, it is certain that any regulation of such subject, made by the state or under its authority, which *directly burdens* interstate commerce, is a regulation of such commerce and re-

pugnant to the Constitution of the United States." 50 Law Ed. U. S. Sup. Ct. Rep. 1148.

Again, in the same case, the Court says:—"We do not pass upon all the regulations formulated by the Constitution on the subject stated, but are clearly of the opinion that the court below rightly held that the particular application of those regulations with which we are here concerned was a direct burden upon interstate commerce and void."

Therefore, since the rule of the Mississippi Commission is not a rule passed upon a subject which is national in its scope or of such a nature as to admit of uniformity of regulation; and further, since its enforcement could not tend to the creation of monopolies or restrain trade, or impose any unreasonable or additional burdens or onerous duties upon the railroad companies, and could not interfere with, obstruct, impede or hinder the carrying of interstate commerce; that, on the contrary, its effect would be salutary, that it would aid and assist the carrying of interstate shipments, we are unable to see wherein the rule violates or runs contrary to the United States Constitution. The rule is valid and comes clearly within the power of the state to enforce.

PRACTICAL WORKINGS OF THE RULE

The plaintiff in error discussing this question on pages 24, etc., Brief, supposes certain conditions that might exist under which great hardship would be visited upon the Railroad Company.

This question we submit should not be determined by suppositious extreme cases.

To take a practical view of the question, should there not be some rule, either under the Interstate Commerce Act or under the Hepburn Act, or somewhere from some legal authority to compel the delivery of cars upon team tracks

so that the same might be unloaded and thereby made to serve their purpose in the matter of general commerce.

If the Railroad Company is to be relieved of any control whatever as to a reasonable prompt delivery of cars upon the team track, it might indefinitely so sidetrack its cars that they could not be unloaded at all.

It is no answer to the proposition that conditions *might* arise under this rule whereby hardship *might* be entailed upon the Railroad Company. It is but a reasonable requirement of the public carrier that it should provide such side tracks and other facilities for delivery of freight that there would be no interruptions or delays, unreasonable, in the carrying on of that business.

In the Atlantic Coast Line case, 206 U. S., page 1, among other contentions it was urged to enforce a rule of the Railroad Commission of North Carolina, would entail pecuniary loss upon the Company.

Mr. Justice White, page 23, etc., dealing with this question, distinguishes the Atlantic Coast Line case from that of Smyth vs. Ames, 169 U. S. 466, and in effect held if the rule was otherwise just and reasonable the same is not inherently unjust and unreasonable because its enforcement would impose some pecuniary loss upon the Company.

The Hepburn Act

Plaintiffs in error, upon page 10 of their Brief, state as follows:

> "The exact case now presented, has not, we believe, been heretofore presented to this Court: i. *e.*, the powers of the State to regulate deliveries at team tracks of Interstate shipments. *For purposes of this argument*, treating it as a case to be 'determined upon principles already settled' we might concede that the general tendency of this Court's decisions have been such to indicate that it would be classed

> as an instance of concurrent jurisdiction, or power, the exercise of which by the State, if in true 'aid of commerce,' and not laying an undue burden on commerce, would be upheld—in the absence of action by Congress."

This statement of counsel for plaintiffs in error very tersely presents the real question involved herein and we submit that this Court has held that the jurisdiction of the States was concurrent with that of the Federal Government in the matter of Interstate Commerce and may be exercised so long as it does not lay any undue burden upon the same.

We are unable to agree with the proposition stated on page 10 of the brief for plaintiffs in error that this general rule, well stated as we submit, was changed or affected by the provisions of the Hepburn Act.

In truth and in fact, this Court has held with reference to that Act that the jurisdiction of the States is concurrent with that of the Federal Government so long as the same is exercised in the aid of commerce and does not obstruct the same.

We submit that the plaintiffs in error in the Court below, not having invoked the question of the rule of the Mississippi Railroad Commission as being in contravention of the Hepburn Act, and there not being in the Record any assignment of error whereby complaint is made of the action of the lower Court in disregarding the provisions of the Hepburn Act, that such question should not be considered by this Court upon the present record. It was held in the case of Maxwell vs. Newbold, 18 How. 1911:

> An assignment of error in a State Court, that the charge of such Court was in conflict with and against the Constitution and Laws of the United

> States, is too general and indefinite to raise a Federal question; it is not sufficient to show that such question was involved in the State Court, and might or ought to have been considered by it. It must appear on the face of the record that the question was raised and acted upon in the State Court, and that the decision was against the right claimed under it.

Again in Cornell vs. Green, 163, U. S., 75, it is stated:

> An assignment of error cannot be availed of to import into a cause, questions which on the record does not show were raised in the Court below rulings asked thereon, so as to give jurisdiction to the Supreme Court of the United States under the Act of Congress of March 3, 1891, Sec. 5.

We do not contend that this Court has no jurisdiction of the case under the writ of error directed to the Supreme Court of the State of Mississippi. A Federal question was raised, viz., that the rule of the Railroad Commission contravened the Interstate Commerce Act.

What we contend is, that this was the only Federal question involved; that the other Federal question, viz., that the rule of the Mississippi Railroad Commission contravened the Federal Statute known as the Hepburn Act, was not raised in the Court below and does not appear anywhere in the record and is only brought into the case upon the brief of the plaintiffs in error.

In the Hamilton Mfg. Co. vs. Mass., 6 Wall. 632, this Court stated:

> Questions not decided in the State Court because not raised and presented by the complaining party, will not be examined in the Supreme Court on a writ of error under the 25 section of the Judiciary Act.

In Bartmeyer vs. Iowa, 18 Wall. 129, this Court stated:

> Where the Supreme Court of the State to which the writ of error is directed has not considered a question, this Court will not go out of its usual course to decide it. 102 U. S., 572.

In Montana ex rel. Haire vs. Rice, 204 U. S., 291, it was stated by the Court:

> Raising a Federal question for the first time in the petition for a writ of error to the said Court and in the accompanying assignments of errors is not sufficient to enable the Supreme Court of the United States to consider that question, even though another Federal question has been properly raised and brought up by the same writ of error.

In the case of Paresio vs. U. S. 207, 368 U. S., the Court held:

> Where a case is brought up from the Circuit Court on the ground that the construction or application of the Constitution of the United States is involved, the record must show that the question was raised for the consideration of the Court below; and under section 10 of the Act of July 1, 1902, 32 Stat. 695, this rule applies to writs of error to review judgment of the Supreme Court of the Philippine Islands.

Rights of States Concurrent with Hepburn Act When Exercised in Aid of and Not as a Burden to Interstate Commerce

Counsel for plaintiff in error on page 10 of their brief, after conceding that the general tendency of this Court's

decisions has been such as to indicate that it (meaning the question involved herein) would be classed as an instance of concurrent jurisdiction or power, if exercised by the State in the aid of commerce, and not used as a means to burden the same, states:

> "But we submit that, by the Hepburn Act, Congress has acted; and that therefore the States are without any further power in the premises."

We respectfully urge and submit that the decisions of this Court, since the Hepburn Act was passed, do not sustain this contention.

In the case of Missouri Railway Company vs. Larabee Flour Mills Company, 211 U. S., page 620, Mr. Justice Brewer, in stating the case said:

> But the main contention on the part of the Missouri Pacific runs along an entirely different line. It is that the Missouri Pacific and the Santa Fe are common carriers engaged in interstate, and as such are subject to the control of Congress, and therefore, in this respect not amenable to the power of the State. It appears from the findings that about three-fifths of the flour of the Mill Company is shipped out of the State, while the other two-fifths is shipped to points within the State. In addition, the hauling of the empty cars from the Santa Fe tracks to the mill was, if commerce at all, commerce within the State.
>
> The roads are, therefore, engaged in both Interstate commerce and that within the State. In the former they are subject to the regulations of Congress; in the latter to that of the State, and to enforce the proper relations between Congress and the State the full control of each over commerce subject to its dominion must be preserved.

The Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat., 379, as well as that of June 29, 1906, c 3591, 34 Stat. 584 was before this Court in this case.

The Court in effect held that

> Notwithstanding the creation of the Interstate Commerce Commission, and the delegation to it by Congress of control of certain matters, a State may, in the absence of express action by Congress or by such a Commission, regulate for the benefit of its citizens local matters indirectly effecting interstate commerce.

The Court distinguishes this case from that of McNeill vs. Southern Railway 202 U. S. 543.

In the case of the Atlantic Coast Line Railroad Company vs. Mazursky (and other cases) 216 U. S., page 123, the main question presented was the right of the General Assembly of South Carolina to enforce a statute of that State imposing a penalty upon the Railroad Company for failure to settle a certain class of claims for loss or damage to property within a limited period.

It was there contended for the Railroad Company that this statute did not fall within the test of a reasonable exercise of police power, but constitutes a burden on Interstate commerce.

Mr. Chief Justice Fuller in announcing the opinion of the Court, on page 133 id., used the language of Mr. Justice Peckam in the case of the Western Union Telegraph Company vs. James 162 U. S., 650, which was as follows:

> "The Statute in question is of a nature that is in aid of the performance of a duty of the Company that would exist in the absence of any such Statute, and it is in no wise obstructive of the duty of the Telegraph Company. It means a penalty for the

purpose of enforcing this general duty of the Company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a Statute. Can it be said that the imposition of a penalty for the violation of a duty which the Company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not."

Chicago, Milwaukee & St. Paul Ry. Co. vs. Solan, 169 U. S., 133, 137;

Pennsylvania Ry. Co. vs. Hughes, 191 U. S. 477, 491;

Missouri Pacific Ry. Co. vs. Larabee Flour Mill Co., 211 U. S., 612, 624.

It was further stated by the Court that the decision in the Atlantic Coast Line and other cases there referred to were not in conflict with

Central of Georgia Ry. Co. vs. Murphy, 196 U. S. 194;

Houston & Texas Central Ry. Co. vs. Mayes, 201 U. S. 321;

McNeill vs. Southern Ry. Co., 202 U. S. 543.

In the case of Southern Railway Co. vs. Reid, 222 U. S., p. 424, this Court defines the three degrees to which the State exercises power over commerce, which are stated: First, exclusively; second, in the absence of legislation by Congress, *until Congress does act;* and third, where Congress having legislated, the power of the State cannot operate at all.

The general principle is announced, referring to the Missouri Pacific Railway Company vs. Larabee Mills, 211 U. S.

612, that where Congress and the State have concurrent power, that of the State is superceded only when the power of Congress is exercised, and the action of Congress must be specific in order to be paramount.

It is further held

> As between Federal Government and the States one authority must be paramount and when it speaks the other must be silent.

We submit that the general contention which seems to be made by counsel for plaintiffs in error that the Hepburn Act is exclusive of all power of the State to control interstate commerce is not sustained by the most recent decisions of this Court.

In fact the Hepburn Act is nothing more than an amendatory assertion by Congress, in statutory form, of its constitutional powers in matters of interstate commerce.

It, the Hepburn Act, is no more an inhibition upon the States to legislate in aid of Interstate commerce than the Constitution itself. It—as is the Interstate Commerce Act—is but an amplification of the rights and powers of the Government under the Federal Constitution in the matters of regulation of Interstate commerce.

We submit most respectfully that the reciprocal demurrage rules of the Mississippi Railroad Commission, both as to the right of the transportation company to charge the consignee for failure to unload cars within a given time that they may be released for general commerce purposes, and the right of action given the consignee against the transportation company for a failure to so place the cars that they may be unloaded within a reasonable time, and thereby releasing them for general commerce purposes, in no wise contravenes the constitutional provision relied upon,

nor the Interstate Commerce Act, nor the Hepburn Act; that such rules are entirely reasonable and are directly in aid of commerce.

In conclusion we desire to refer to the cases cited upon pages 26 and 27 of defendant's brief.

The Virginia case of the Southern Ry. Co. vs. Commonwealth, 107 Va., 171, was a case involving a rule requiring the Railroad Company *unconditionally* to furnish cars for shipment within four days after application. The Court held that this requirement was unreasonable and a burden on Interstate Commerce and in conflict with the Act of Congress regulating the same.

It is further held, however, by the Court in this case:

> A state may, on the absence of act by Congress, prescribe rules and regulations for transportation companies in the matter of furnishing and loading cars for interstate shipments, provided such rules and regulations be reasonable and just, and do not in their application directly infringe upon the commerce clause of the Constitution of the United States, or violate some right of such companies or shippers protected thereby.

> We find nothing in this case to give comfort to the proposition that a State may not, when such rule or regulation is reasonable, and does *not impose a burden upon Interstate commerce*, exercise control over Interstate commerce. In fact, when such regulation is *reasonable* and in *aid of Interstate commerce*, it seems to be the settled rule that the powers of the State are concurrent with those of Congress.

In the Kansas case, Patterson vs. the Missouri Pacific [illegible] Kan., page 236, there is a differentiation made

from the Mayes case referred to in the brief (201 U. S., 321) in that the Supreme Court of Kansas held first a State requirement of the delivery of cars upon the request of shippers, containing exemptions from "strikes, unavoidable accidents, or other public calamity," was not an unreasonable requirement.

The general proposition of the rights of the States to make reasonable rules and regulations in matters of Interstate Commerce is upheld in this case.

In the Georgia case, Southern Ry. vs. Atlanta Sand Co., 135 Geo. 35-68, practically the same question as was presented in the Kansas case was before the Court, and it was held generally that,

> In the construction of a Statute the Courts will not generally attribute to the Legislature the intention to punish the failure to do an impossible thing, if another construction can be legitimately given the Act.

The Minnesota case is more directly in point than any of the cases referred to upon pages 26 and 27 of the brief for plaintiffs in error.

In that case, Hardwick Farmers Elevator Co. vs. Chicago, Rock Island & Pacific Ry. Co., 110 Minn., 25-40, the direct question was passed upon, it being there insisted by the Railroad Company that the Hepburn Act being devised in part "in aid of commerce" is exclusive in its jurisdiction of the question there involved.

The question involved was the power of the State to legislate in a matter of reciprocal demurrage. The reference below to the opinion very clearly sets out the question involved and the determination of the same by that Court. The Court there says:

* * * 3. The power of Government may be divided into four classes. (1) Those which belong exclusively to the State; (2) those which belong exclusively to the National Government; (3) those which may be exercised concurrently and independently by both; (4) those which may be exercised by the States, but only until Congress shall see fit to act upon the subject.

4. State laws enacted in the exercise of the police power and indirectly and remotely affecting Interstate commerce, being in aid thereof and not a burden thereon, may be within the fourth class of cases and enforceable, unless superceded by some Act of Congress, if they are reasonable in their operation.

5. The so-called reciprocal demurrage law, as designed and in operation, tended to insure prompt performance by the carrier of its common law duty to furnish cars for transportation of freight, and was not displaced by the Interstate Commerce Act as amended by the Hepburn law, primarily intended to secure reasonable rates and to prevent unjust discrimination. * * *

We most respectfully submit in conclusion, that

1. The power of the State of Mississippi, through its Railroad Commission, and the exercise of such power in providing for delayage charges, for failure to place cars after reaching destination upon team tracks, was not repugnant to the Constitution of the United States and amendments thereto nor was it in contravention to the Interstate Commerce Act as amended by the Hepburn law; and

2. That such requirement of the Railroad Commission of the State of Mississippi, that the cars of the said Railroad

Company, plaintiff in error, be so placed on team tracks within the time stated, was a reasonable requirement; and

3. That such requirement in no wise interfered with or placed any undue burden on commerce, but on the other hand such rule, in effect, was in aid of the same.

WHEREFORE, defendants in error, most respectfully submit that the decision of the lower Court, the Supreme Court of Mississippi, should be affirmed.

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